



U.S. Department of Health and Human Services  
Assistant Secretary for Planning and Evaluation  
Office of Disability, Aging and Long-Term Care Policy

# **ACCESSING WORKERS' COMPENSATION INSURANCE FOR CONSUMER-EMPLOYED PERSONAL ASSISTANCE SERVICE WORKERS:**

## **Issues, Challenges and Promising Practices**

**June 2004**

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This report was prepared under contract #100-02-0018 between the U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Office of Disability, Aging and Long-Term Care Policy and the Boston College School of Social Work. For additional information about this subject, you can visit the DALTCP home page at <http://aspe.hhs.gov/daltcp/home.shtml> or contact the ASPE Project Officer, Pamela Doty, at HHS/ASPE/DALTCP, Room 424E, H.H. Humphrey Building, 200 Independence Avenue, S.W., Washington, D.C. 20201. Her e-mail address is: [Pamela.Doty@hhs.gov](mailto:Pamela.Doty@hhs.gov).

**ACCESSING WORKERS' COMPENSATION INSURANCE  
FOR CONSUMER-EMPLOYED PERSONAL ASSISTANCE  
SERVICE WORKERS:  
Issues, Challenges and Promising Practices**

Susan A. Flanagan, M.P.H.  
Westchester Consulting Group

June 7, 2004

Prepared for  
Office of Disability, Aging, and Long-Term Care Policy  
Office of the Assistant Secretary for Planning and Evaluation  
U.S. Department of Health and Human Services  
Contract #100-02-0018

The research reported herein was performed pursuant to a contract awarded to Boston College Graduate School of Social Work by the Department of Health and Human Services (HHS), Office of the Assistant Secretary for Planning and Evaluation (ASPE). The opinions and conclusions expressed are solely those of the author and should not be construed as representing the opinions or policy of Boston College or HHS/ASPE or any agency of the Federal Government.

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## **ACKNOWLEDGEMENTS**

A number of organizations and individuals made this paper possible. I am grateful to the U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation for funding the study under the direction of Boston College Graduate School of Social Work. I also appreciate the assistance of a number of individuals. They include Justin Klotz who assisted with data collection and compilation, Philip D. Murphy, Esq. who assisted with preparing case law digests and for his thoughtful comments regarding workers' compensation law and issues; and Aaron Grogg who assisted with the production of this report.

The paper also has benefited greatly from the efforts and thoughtful comments and suggestions of a number of individuals. I appreciate the thoughtful comments received from Kevin J. Mahoney, Ph.D., and Pamela Doty, Ph.D., Project Officers for the study, Charles Sabatino, Esq., Marie Squillace, Ph.D. and Larry O. Orr, Ph.D.

## EXECUTIVE SUMMARY

Individuals with disabilities of all ages have greater access to publicly-funded, self-directed home and community-based services and supports than ever before (Flanagan, 2001). Some self-directed support service programs offer service recipients the option of being the common law (e.g., household) employer of their personal assistance service (PAS) workers. However, with greater choice and control come individual responsibilities and risk of liability. One possible risk of liability is associated with a PAS worker being injured on the job. One way publicly-funded self-directed support service programs can reduce the risk of liability for workplace injury for themselves and service recipients who are common law employers of PAS workers is by arranging and paying for workers' compensation insurance.

Workers' compensation in the United States is essentially a combined government and private "no-fault," social insurance program, mandated by state or territorial law, administered by one or more state or territorial agencies and paid for entirely by employers. It provides medical, disability and other benefits (e.g., death and burial) for most workers whose injuries and illnesses "arise out of and in the course of employment" (Lencsis, 1998).<sup>1</sup>

All 50 states, the District of Columbia and the five territories have enacted workers' compensation insurance laws and administer systems. These laws and systems are specific to each state and territory and can be complex to understand and administer. A basic objective of workers' compensation is that coverage under the law should be virtually, if not completely, universal. In most states, coverage is compulsory for employers with penalties for those who do not comply. However, for various historical, political, economic and administrative reasons, no state law covers all forms of employment. The most common classes of exempt employees are casual workers who work only occasionally or intermittently for a given employer such as domestic servants (U.S. Chamber of Commerce, 2002).

Many states and territories, at least informally, include PAS workers under the domestic service employment classification for workers' compensation purposes. However, the majority of state and territory workers' compensation agency staff report that the final determination of whether a service recipient's PAS worker falls into the

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<sup>1</sup> Except in the case of Washington State and Oregon. Under Washington State law, a portion of the workers' compensation insurance premium, equal to one-half of both the medical-aid rate and supplemental-pension assessment may be paid by employee contribution. The Department of Labor and Industries does not collect each worker's share directly. Instead, employers have the option to collect their employees' portion through payroll deductions. Oregon has implemented the Workers' Benefit Fund Assessment ("Cents-Per-Hour") Rate to pay for certain programs that provide direct benefits to injured workers and their beneficiaries. In 2003, the assessment rate was 3.6 cents per hour or partial hour worked by each paid employee that an employer provides with workers' compensation insurance coverage. Employers contribute at least half (1.8%) deducting no more than half of it (1.8%) from workers' wages. Employers then submit the total to the state through OR Combined-Payroll-Tax Reporting System.

domestic service classification in a jurisdiction is often made by an administrative law judge when a workers' compensation claim is disputed. Thus, public programs administering self-directed support service programs and service recipients enrolled in these programs face great uncertainty when trying to assess the obligation to provide workers' compensation insurance coverage for PAS workers who work for service recipients in and around their homes.

This report focuses on workers' compensation laws and systems as they pertain to domestic service workers, and in particular, PAS workers in 50 states, the District of Columbia, five U.S. territories and one tribal government<sup>2</sup> and addresses the following questions:

- How do workers' compensation programs work?
- What states and territories afford individuals with disabilities who are household employers the opportunity to purchase workers' compensation insurance coverage for their domestic service workers, and in particular for PAS workers?
- How accessible is workers' compensation insurance coverage for household employers who hire domestic service, and in particular, PAS workers directly?
- How does the cost of workers' compensation insurance premiums vary for household employers hiring domestic service/PAS workers across jurisdictions and markets?
- What issues and challenges have been reported by state workers' compensation agency staff and insurance carriers regarding the administration of the workers' compensation systems and the provision of insurance for domestic service and PAS workers?
- What promising practices have been implemented by jurisdictions to facilitate public programs arranging and paying for workers' compensation insurance for service recipients who hire domestic service/PAS workers, thereby reducing the risk of liability related to workplace injury for state program agencies and service recipients?

Workers' compensation laws and regulations, program material and related literature and published reports pertaining to domestic service, and in particular to personal assistance, were reviewed for each of the 57 jurisdictions. In addition, follow-up calls were conducted with key state and territorial worker' compensation agency, insurance company and agent staff as needed to obtain information not readily available in the secondary information reviewed.

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<sup>2</sup> Five territories include American Samoa, Guam, Commonwealth of Northern Mariana Islands, Puerto Rico and the Virgin Islands. The tribal government is the Navajo Nation.

Key study findings include:

- All 50 states and five U.S. territories have enacted workers' compensation laws and administer systems, however, they are specific to each jurisdiction and can be complex.
- Twenty-five states and two U.S. territories completely exempt and 22 states, the District of Columbia and two territories partially exempt domestic service workers from their workers' compensation laws.
- All jurisdictions, except for Wyoming, allow household employers to elect coverage for domestic service workers who are exempt from workers' compensation laws.
- The majority of jurisdictions' workers' compensation laws and employment classification codes do not clearly define domestic service or reference PAS workers in the definition.
- The majority of jurisdictions reported that PAS workers fall under the domestic service employment classification for workers' compensation purposes.
- The majority of jurisdictions also reported that the final determination of whether a service recipient's PAS worker falls into the domestic service classification is often made by an administrative law judge when a workers' compensation claim is disputed.
- Publicly-funded self-directed support service programs and service recipients who are the common law employers of their PAS workers face great uncertainty when trying to assess the obligation to provide workers' compensation insurance coverage for PAS workers.
- Publicly-funded self-directed support service programs can reduce/eliminate the risk of liability for workplace injury for themselves and service recipients who are the common law employers of their PAS workers and the uncertainty regarding coverage by arranging and paying for workers' compensation insurance.
- In the majority of jurisdictions, access to workers' compensation insurance through the voluntary insurance market is extremely limited for publicly-funded self-directed support service programs and service recipients (e.g., household employers), and in some jurisdictions it is "non-existent." This is due in part to insurance agents and carriers having little incentive to broker/write policies for household employers due to small fees/premiums, significant administrative burden and costs and the perceived high risk of domestic service and PAS worker injury.

- Workers' compensation claims experience for the Massachusetts Medicaid Personal Care Attendant Program and the New Jersey Personal Preference Program have challenged widely held assumptions regarding the perceived high risk of domestic service and PAS worker injury over the past three years.
- Household employers' access to workers' compensation insurance typically is greater through exclusive or competitive State Insurance Funds or through residual insurance markets (e.g., jurisdictions' Assigned Risk Plans or Insurers of Last Resort).
- Eighteen states, the District of Columbia and two U.S. territories offer household employers the opportunity to purchase a workers' compensation insurance rider on a conventional homeowner's and tenant's insurance policy for occasional domestic service workers with at least three states reporting that the option is mandated by law. However, there is a concern that filing a claim for workers' compensation through a homeowner's insurance policy could jeopardize the status of the household employer's homeowner's insurance policy (e.g., could be cancelled) and thus jeopardize their mortgage which may have homeowner's insurance as a requirement.
- The cost of workers' compensation insurance varies significantly by jurisdiction, with the residual insurance market premiums, in general, being the most costly. This insurance market is often the only option for household employers to purchase workers' compensation insurance for their domestic service (e.g., PAS) workers.
- The most frequently reported issues/challenges reported by jurisdictions' workers' compensation agency staff regarding the administration of workers' compensation systems and providing insurance for domestic service and PAS workers included:
  - Difficulty classifying PAS workers for workers' compensation purposes (e.g., are they under domestic service or not; if not, what classification are they in?),
  - Limited access to the voluntary workers' compensation insurance market for household employers,
  - Premiums for domestic service workers tend to be low and often do not cover the cost of losses incurred,
  - Workers' compensation agency staff reported they do not many policies or claims related to domestic service so are not knowledgeable regarding the issues (e.g., PAS) and often do not have good premium and claims data to make policy with, and

- In many jurisdictions, workers' compensation insurance premiums have gone up for all employers including household employers.

Key promising practices include:

- **Workers' Compensation Laws That Include PAS In The Definition of Domestic Service - Hawaii**

Hawaii includes the terms "attendant care" and "day care services" in the definition of domestic service included in the state's workers' compensation law. This clarifies the classification for PAS in the state's workers' compensation law for household employers, PAS workers, publicly-funded self-directed support service programs and workers' compensation hearing officers.

- **Including PAS In The Employment Classification For Domestic Service – North Dakota**

North Dakota includes the term personal assistance in its employment classification under domestic service for workers' compensation purposes as "those individuals performing home help services or providing personal assistance or home care for persons who are convalescent, aged or acutely or chronically ill or disabled."

- **Developing An Employment Classification For PAS Under Domestic Service - Massachusetts**

Massachusetts has developed an employment classification code, specifically for PAS workers (0918, Domestic Service, Inside, Physical Assistance) that clearly describes the tasks performed while keeping the classification under domestic service.

- **Developing A Workers' Compensation Program Specifically For Domestic Service - Pennsylvania**

Pennsylvania's State Workmen's Insurance Fund (SWIF) has a program and a workers' compensation insurance policy (Domestic Service Exemption Policy) that is specific to household employers who employ domestic service workers to work in and around their homes. It also has a designated staff who is well trained and knowledgeable regarding domestic service issues and SWIF policies and procedures. The application process has been streamlined and staff is easy to access for assistance.

- **Accessing Workers' Compensation Insurance Through The Voluntary Insurance Market - Massachusetts**

Massachusetts has successfully recruited an insurance agent and a voluntary insurance carrier to broker and write insurance policies for over 9,000 persons with disabilities enrolled in the State's Medicaid Personal Attendant Care Program rather than purchasing policies from the residual insurance market.

- **Accessing Workers' Compensation Insurance Through The Residual Market – Arizona and New Mexico**

Arizona and New Mexico both have residual insurance markets that consist of both “insurers/markets of last resort” and Assigned Risk Plans. Having both options appear to increase small and moderate sized employers access to workers' compensation insurance at more competitive prices. This approach has the potential of providing increased access to household employers who wish to purchase workers' compensation insurance for their in-home domestic service workers including personal assistance workers.

- **Accessing Workers' Compensation Insurance For Domestic Service Through Homeowners' And Tenants' Insurance Policies – New Jersey**

New Jersey provides the most comprehensive system for accessing workers' compensation insurance through homeowners' and tenants' insurance by requiring all homeowners' and tenants' insurance policies to include an endorsement for workers' compensation insurance for occasional domestic service workers. Homeowners and tenants can then purchase an endorsement for full-time domestic service workers. Workers' compensation service endorsements for domestic service are available in both the voluntary and residual insurance markets in New Jersey. One concern regarding household employers accessing workers' compensation insurance coverage through homeowners' insurance policies is that a workers' compensation claim could cause the insurance carrier to either significantly raise the household employer's homeowner's insurance premium or cancel the homeowner's insurance policy, which often is a requirement for a mortgage. New Jersey covers this issue by providing workers' compensation insurance coverage for occasional and full-time workers in both the voluntary and residual insurance markets.

- **Rate And Premium Setting Methods – Massachusetts, Maryland and Washington State**

Massachusetts and Maryland use the “per \$100 payroll” and “per household policy” method to compute workers' compensation insurance rates and premiums, respectively. These methods reduce the level of administrative burden for the household employer, his or her Fiscal/Employer Agent and the

insurer, particularly when the household employer hires multiple PAS workers.

Washington State uses the “per hour” and “per household” method to compute workers’ compensation insurance rates and premiums, respectively. The “per hour” method more accurately measures the risk of workplace exposure for multiple workers. However, to work effectively, good time reporting must be available for all workers.

- **Using Minimum Premium Data To Develop Benchmarks For Workers’ Compensation Premiums – New Jersey, Idaho And Maryland**

The minimum premium data presented in Table 4, Table 5, and Table 6 demonstrates the variability of workers’ compensation insurance rates by market and jurisdiction for similar employment classifications (e.g., domestic service). Jurisdictions can use this information to develop benchmarks to compare their workers’ compensation premiums and learn from other states’ experience. For example, the jurisdiction that has the lowest actual premiums for a standard domestic service workers’ compensation insurance policy from the voluntary and residual insurance markets is New Jersey. The actual premium for a standard workers’ compensation insurance policy for all occasional domestic service workers in a household is \$16.00/household/year. The actual premium for a standard workers’ compensation insurance policy for a full-time domestic service worker is \$76.00/year for the first worker and an additional \$60/year for each additional full-time worker hired. Under the homeowners’ or tenants’ insurance workers’ compensation endorsement the premium is \$1.00/policy/year for all occasional domestic service workers working in the home and \$61/year for the first full-time worker and \$60/year for each additional full-time worker working in the home. The premiums for the standard workers’ compensation insurance policy and the homeowner’s/tenant’s workers’ compensation endorsement for domestic service are the same for both the voluntary and residual insurance markets.

Idaho and Maryland also offer low minimum premiums through a State Insurance Fund (e.g., \$150 per capita for 0908-occasional and \$175.00 per capita for 0913 – full-time and \$175 per household policy for 0913 – part or full-time, respectively (see Table 6). However, Idaho’s minimum premiums for the residual insurance market are almost twice as much as the State Insurance Fund, whereas Maryland’s minimum premiums are the same in the State Insurance Fund as they are in the residual insurance market (see Table 4).



- **Using Fiscal/Employer Agents To Facilitate Purchasing Workers' Compensation Insurance, And Invoicing and Processing Claims – Massachusetts, New Jersey And Pennsylvania**

In Massachusetts, New Jersey and Pennsylvania, Fiscal/Employer Agents participating in the State's self-directed support service program (e.g., MA Personal Attendant Care Program, NJ Personal Preference Program, and PA Attendant Care Program) will not process a payroll check for a worker unless the service recipient has a current workers' compensation policy for his or her PAS worker(s). Thus, the Fiscal/Employer Agent ensures the publicly-funded self-directed support service program that workers' compensation insurance coverage has been obtained for all service recipients and renewed annually.

In each state, the Fiscal/Employer Agent(s) is the key contact that communicates with either the insurance agent, or the voluntary insurance carrier/State Insurance Fund/residual market administrator or both making sure initial policies are implemented and that policies are renewed in a timely manner. In addition, each state's Fiscal/Employer Agent(s) is responsible for completing the Wage Statement Form that the insurer needs to accurately compute a benefit for an injured worker.

In all three states, the Fiscal/Employer Agent(s) is responsible for paying the service recipient's workers' compensation premiums out of their public benefit. In Massachusetts, the insurer bulk invoices the four Fiscal/Employer Agents for the service recipients they represent, reducing the insurer's invoicing efforts from 10,000 to four invoices per year.

- **Allowing Household Employers To Elect Workers' Compensation Insurance Coverage For Family Members Who Are Paid Domestic Service Workers, Including PAS Workers – Hawaii**

Many states' workers' compensation laws are silent on whether family members who are paid domestic service workers, including PAS workers, may be considered covered workers. For the purpose of this study it was determined that these states allowed household employers to elect workers' compensation insurance coverage for family members who are paid domestic service workers including PAS workers.

Hawaii exempts family members who provide paid domestic services, including personal assistance services from its workers' compensation law, but allows household employers to elect coverage for these workers. States should consider clarifying their workers' compensation laws to allow household employers to elect workers' compensation insurance coverage for family members who are paid domestic service workers including PAS workers.

## I. INTRODUCTION

Over the past decade, individuals with disabilities and chronic conditions have had greater access to publicly-funded, self-directed home and community-based services and supports than ever before (Flanagan, 2001). Under the self-directed service delivery model, individuals have increased choice and control over the services they receive and the individuals who provide them. In some cases, service recipients have the option of being the common law (household) employer of their PAS workers and managing many, if not all, of the employer-related responsibilities.

However, with greater choice and control come individual responsibilities and risk of liability, particularly when the service recipient is the common law (household) employer of his or her PAS worker. One possible risk of liability is associated with a PAS worker being injured on the job. One way public programs can reduce the risk of liability for workplace injury for themselves and service recipients who are household employers of PAS workers is by arranging and paying for workers' compensation insurance.

Workers' compensation in the United States is a combination government and private "no-fault," social insurance<sup>3</sup> program that provides medical, disability and other benefits (e.g., death and burial) for most workers whose injuries and illnesses "arise out of and in the course of employment" (Lencsis, 1998). All 50 states, the District of Columbia and the five U.S. territories have enacted workers' compensation laws and administer systems, however, they are specific to each jurisdiction and can be complex to understand and administer (U.S. Chamber of Commerce, 2002).

A basic objective of workers' compensation is that coverage under the law should be virtually, if not completely, universal. In most states, coverage is compulsory for employers with penalties for those who do not comply. However, for various historical, political, economic and administrative reasons, no state law covers all forms of employment (U.S. Chamber of Commerce, 2002).

Whether non-business employment (e.g., domestic service) should be covered for workers' compensation is a subject for debate. From a social policy perspective it has been argued that the ultimate goal of workers' compensation should be protection for all employees since the losses due to injury for a non-business or domestic worker is no less serious than for an industrial worker. Others argue that workers' compensation insurance is a "business expense" and as such, the cost of insurance should be passed along to the customer in the price of the product. In the case of non-business or domestic service, the workers' employment "is not in the course of the trade, business, profession or occupation of the household employer."<sup>4</sup> As such, the household employer must assume

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<sup>3</sup> The 1993 Social Security Annual Statistical Supplement reported that "Workers' Compensation was the first form of social insurance to develop widely in the United States."

<sup>4</sup> Section 102.07(4)(a) of the Wisconsin Workers' Compensation Law.

the total cost of insurance directly.<sup>5</sup> Larson, a national expert on workers' compensation law, argues that non-business or domestic service employment should be exempt from workers' compensation laws (Larson, 2002).

There are a number of barriers that can affect a publicly-funded self-directed support service program's ability to manage the risk associated with a PAS worker being hired by service recipients being injured on the job and arrange and pay for workers' compensation insurance on behalf of service recipients who hire PAS workers directly. The first is the lack of clarity in jurisdictions' workers' compensation laws and employment classification code language regarding the employment status of PAS workers hired directly by service recipients.

The majority of state and territorial workers' compensation agency staff reported informally that PAS workers who work for household employers (e.g., service recipients) are included in the domestic service employment classification (see Table 7). These workers are also considered in the domestic service classification by the U.S. Department of Labor<sup>6</sup> and Internal Revenue Service.<sup>7</sup> However, the majority of jurisdictions' workers' compensation laws and employment classification codes poorly define domestic service and often do not specifically reference support service workers such as PAS workers (See Table 7). Thus, the final determination of whether a service recipient's PAS worker falls into the domestic service employment classification for workers' compensation purposes, is often made by an administrative law judge when a workers' compensation claim is disputed. If an employer's worker is found to be covered (non-exempt) under the law and the employer is determined to be out of compliance with the law, significant penalties can be levied and the employer may be liable for tort liability (see Table 2).

The second is cost. The household employer, or in the case of publicly-funded self-directed support service programs, the program agency must assume the full cost of insurance.<sup>8</sup> This is because the service recipient, as household employer, is not engaged in a "trade, occupation or business" and this cannot pass the cost of insurance on to the customer through the price of the product (Larson, 2002). In addition, the cost of

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<sup>5</sup>Under Washington State law, a portion of the workers' compensation insurance premium, equal to one-half of both the medical-aid rate and supplemental-pension assessment may be paid by employee contribution. The Department of Labor and Industries does not collect each worker's share directly. Instead, employers have the option to collect their employees' portion through payroll deductions. Oregon has implemented the Workers' Benefit Fund Assessment ("Cents-Per-Hour") Rate to pay for certain programs that provide direct benefits to injured workers and their beneficiaries. In 2003, the assessment rate was 3.6 cents per hour or partial hour worked by each paid employee that an employer provides with workers' compensation insurance coverage. Employers contribute at least half (1.8%) deducting no more than half of it (1.8%) from workers' wages. Employers then submit the total to the state through Oregon Combined-Payroll-Tax Reporting System.

<sup>6</sup> Department of Labor Employment Standards Administration, Wage and Hour Division, 29 CFR 552, Application of the Fair Labor Standards Act to Domestic Services, *Federal Register*, vol. 66, No.13, January 19, 2001, pp. 5481-5489.

<sup>7</sup> IRS National Taxpayer Advocate FY 2001 Annual Report to Congress, Taxpayer Advocate Service, Washington, DC 20016.

<sup>8</sup> Except Washington State and Oregon (see Footnote #5).

workers' compensation insurance varies significantly by jurisdiction. They also can be significant, particularly if the service recipient hires multiple PAS workers and the jurisdiction uses a per capita methodology to establish rates and premiums for domestic service workers (see Table 4, Table 5 and Table 6).

The third is the concept and procedures related to workers' compensation are not easy to understand and manage. Some experts in the field recommend using an insurance agent/producer that is familiar with a jurisdiction's workers' compensation law and insurance related administrative procedures in order to obtain appropriate access to the insurance and at a reasonable cost. Others, in particular state workers' compensation agency staff, have reported that agents may not have an incentive to broker workers' compensation insurance policies for household employers with voluntary or residual market insurance carriers. This is due, in part, to the size of the administrative fee they receive (e.g., \$15-20/policy) and the amount of paperwork that is required to quote a policy and manage policy renewals with an insurance carrier.

The fourth is insurance carriers in the voluntary workers' compensation insurance market often do not have an incentive to write workers' compensation insurance policies for household employers due to low premiums, significant administrative burden and associated costs and perceived high risk of liability (see Table 3).<sup>9</sup> The voluntary market's disinterest in writing workers' compensation insurance policies for household employers often results in the residual market being the only source of workers' compensation insurance to them and public agencies operating self-directed support service programs. The residual market is considered the "market of last resort" and is the primary source of insurance for employers that are considered poor risks or have limited and/or poor claims experience. Workers' compensation premiums can be significantly higher in the residual market than in the voluntary market or state insurance funds (see Table 4, Table 5 and Table 6).

So the key question for publicly-funded self-directed support service programs and service recipients is: "What is the best way to address the potential risk of liability associated with a PAS worker being injured on the job when the service recipient is the common law employer of the worker?"

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<sup>9</sup> Actual loss experience for two Medicaid-funded self-directed support service program has not supported the insurance industry's perception of workplace risk for personal assistance service workers. The MA Medicaid PCA Program (9,291 consumer-employers in 2003-2004) has had a low claims experience since workers' compensation insurance policies have been required of all consumer-employers in 1999. In 1999-2000 there were 4,581 consumer-employers and 70 claims, all closed as of 6/30/03. In 2000-2001 there were 5,666 consumer-employers and 52 claims, all closed as of 6/30/03. In 2001-2002 there were 6,938 consumer-employers and 68 claims, with 5 claims still open as of 6/30/03. In 2002-2003 there were 8,144 consumer-employers with 80 claims, with 22 open as of 6/30/03. For the period 2001-2002, McCarthy Insurance Agency reported that Atlantic Charter, the voluntary insurance carrier for consumers enrolled in the MA Medicaid PCA Program, received approximately \$2,389,620 in audited premiums and paid out approximately \$489,900 for 68 claims based on approximately \$119,385,197 in total payroll. Program staff for the NJ Personal Preference Program (500 consumer-employers in 2003) reported there have been no claims filed from the date consumers started receiving services in May 2000 to the present (9/30/03).

## **A. Scope Of This Report**

This report focuses on workers' compensation laws and systems as they pertain to domestic service workers, and in particular, PAS workers in 50 states, the District of Columbia, five U.S. territories and one tribal government<sup>10</sup> and addresses the following questions:

- How do workers' compensation programs work;
- What states and territories afford individuals with disabilities who are household employers the opportunity to purchase workers' compensation insurance coverage for their domestic service workers, and in particular for PAS workers;
- How accessible is workers' compensation insurance coverage for household employers who hire domestic service, and in particular, PAS workers directly;
- How affordable are workers' compensation insurance policies for household employer hiring domestic service/PAS workers;
- What issues and challenges have been reported by state workers' compensation agency staff and insurance carriers regarding the administration of workers' compensation systems and the provision of insurance for domestic service and PAS workers; and
- What promising practices have been implemented by jurisdictions to facilitate public programs arranging and paying for workers' compensation insurance for service recipients who hire domestic service/PAS workers, thereby reducing the risk of liability related to workplace injury for state program agencies and service recipients?

## **B. Methodology**

The methodology for this analysis involved the review of a variety of secondary information sources related to workers' compensation laws pertaining to domestic service workers, and in particular, PAS workers in 50 states, the District of Columbia and five U.S. territories and one tribal government. Materials reviewed for each of the 57 jurisdictions included, but were not limited to:

- Workers' compensation laws and regulations,
- Workers' compensation program and insurance carriers' materials, and

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<sup>10</sup> The five territories include, American Samoa, Guam, the Commonwealth of Northern Mariana Islands, Puerto Rico and the Virgin Islands. The one tribal government is the Navajo Nation.

- Related literature, including published reports.

Follow-up calls were conducted with key state workers' compensation, insurance company and agent staff in each jurisdiction as needed to obtain information not readily available in the secondary information reviewed.

### **C. Limitations Of This Report**

The information presented in this report is the most accurate information available from both primary and secondary sources at the time it was collected. Efforts were made to cross-check the validity of the information presented whenever possible.

Secondary information related to workers' compensation systems and how they apply to domestic service and PAS workers in state publications, including state web sites, was limited. As a result, agency staff in each of the jurisdictions had to be contacted on an "as needed" basis to "fill in the blanks." When contacted, state workers' compensation agency and private insurance agency staff's interpretation of workers' compensation law related to the domestic service classification, PAS workers and related policy and procedures was inconsistent. This was due, in part, to how the domestic service workers were included (e.g., either exempt or partially exempt) in the law in many jurisdictions. In addition, the percent of household employers who actually purchase workers' compensation insurance in a jurisdiction is often small.<sup>11</sup>

In addition, the accuracy of some secondary information varied. This was due in part to frequent changes in state workers' compensation laws and policy from 1990 to the present and the timing of published reports.

## **II. WHAT IS WORKERS' COMPENSATION?**

Workers' compensation in the United States is a combined government and private insurance program mandated by state or territorial law, administered by one or more state or territorial agencies and paid for entirely by employers. It is a no-fault social insurance concept, similar to no-fault automobile insurance, that mandates the payment of statutorily defined medical, disability<sup>12</sup> and other benefits (e.g., death and burial) to most workers whose injuries and illnesses "arise out of and in the course of employment" (Lencsis, 1998). In general, workers' compensation is compulsory for employers and significant penalties may be levied for those who do not comply with the law (see Table 1 and Table 2).

All fifty states, the District of Columbia and the five U.S. territories have enacted workers' compensation insurance laws and systems. They are specific to each jurisdiction and can be complex. A basic objective of workers' compensation is that

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<sup>11</sup> State workers' compensation agency staff often reported that they do not address issues related to domestic service and personal assistance service workers on a routine basis.

<sup>12</sup> Disability includes payment for loss wages.

coverage under the laws be virtually, if not completely, universal. However, for various historical, political, economic, and/or administrative reasons, no state or territory law covers all forms of employment (U.S. Chamber of Commerce, 2002).

Exempt (non-covered) employees represent a relatively small percent of total employees, but they are important, especially with regard to employers' liability insurance. The most common classes of non-exempt employees are "casual" workers who work only occasionally or intermittently for a given employer such as domestic servants and agricultural workers, minor employers who employ less than three, four or five workers, and domestic service workers. Currently, 16 states and one U.S. territory exempt minor employers with less than two three, four or five workers from mandatory coverage.<sup>13</sup> Thirty-four states, the District of Columbia and one territory exempt "casual" employers or "any employee whose employment is not in the trade, business, profession or occupation of the employer" or both.<sup>14</sup> Twenty-five states and two U.S. territories exempt domestic service from their workers' compensation laws (see Table 1). In addition, 22 states and the District of Columbia and two territories partially exempt domestic service based on specific criteria (e.g., the number of hours worked or payroll for a certain period of time) (see Table 1). Finally, two states and one U.S. territory consider domestic service workers as non-exempt workers under each jurisdiction's workers' compensation law.<sup>15</sup>

Most state workers' compensation laws use similar language to describe injuries that are covered under law. Such injuries must be caused by accidents "arising out of and in the course of employment," means that the accident must be caused by a risk that is "closely," "directly," or "distinctly" associated with the employment.<sup>16</sup> If the risk is not associated with the employment but with the employee's own personal activities, it is considered a personal risk and the accident is never compensable (Lencsis, 1998).

#### **A. U.S. Workers' Compensation System: A Historical Overview**

The current workers' compensation insurance system in the U.S. developed as a result of the late 1800's industrial expansion and the subsequent push to protect injured workers who were left with little recourse following accidents but to sue their employer for workplace negligence. Lawsuits rarely were successful due to the significant cost of litigation and the difficulty proving employer negligence (National Conference of Insurance Legislators, 2002).

States developed workers' compensation laws in the early twentieth century as a means of providing prompt and certain financial relief for workers who suffer employment-related injuries or diseases. These laws established no fault compensation systems for injured workers covering expenses for medical treatment and lost wages. In

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<sup>13</sup> AL, AR, GA, KY, ME, MI, MS, MO, NM, NC, SC, TN, VA, WA, WV, TX, and American Samoa.

<sup>14</sup> AK, AZ, AR, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, IN, IA, LA, ME, NE, NV, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, UT, VT, VA, WA, WI and A.S.

<sup>15</sup> NH, NJ and PR require domestic service workers, including personal assistance service workers to be covered under the jurisdiction's workers' compensation laws.

<sup>16</sup> See for example, New York Workers' Compensation Law Sec. 10(1).

1911, Wisconsin enacted the first permanent workers' compensation law (a 1910 New York statute had been declared unconstitutional). By 1949, each state had adopted its own, state-specific, workers' compensation system. Currently, all 50 states, the District of Columbia and the six U.S. territories have enacted workers' compensation laws (National Conference of Insurance Legislators, 2002).

The decades since the enactment of these laws have witnessed expansion of the workers' compensation coverage across the country, including the establishment of self-insurance programs, state funds, and federally<sup>17</sup> provided coverage. In addition, there has been a broadening of the kinds of injuries workers' compensation covers, (e.g., soft tissue claims in addition to amputations and other related injury claims) (National Conference of Insurance Legislators, 2002).

In 1972, the National Commission on State Workmen's Compensation Laws, created through the Occupational Safety and Health Act of 1970, issued a report offering 19 recommendations for improving workers' compensation coverage, including increasing the benefit levels. The recommendations led to a number of states revising their laws and to a significant increase in costs. By the late 1980's, the residual effects of the 1970's statutory changes, combined with other market influences, resulted in soaring loss ratios and costs that rose between 10-15 percent annually (American Academy of Actuaries, 2000).

In the mid-1980's, the workers' compensation system was in crisis and the crisis lasted for nearly ten years. During this time, workers' compensation costs rose much faster than general inflation. In state after state, insurers' costs increased at a much faster rate than the premiums they took in, creating an instability that could not continue (Hager, 1995).

Reforms throughout the 1990's addressed many aspects of the state workers' compensation systems, including decreasing benefit levels, opening competition, instituting workplace safety incentives, and allowing for dispute resolution. The most significant changes addressed were related to medical cost containment (National Conference of Insurance Legislators, 2002).

Rather than overhauling workers' compensation statutes, many state legislatures are evaluating and modifying the reforms currently in place.<sup>18</sup> Simultaneously, the voluntary insurance market is "tightening." Some report this tightening is due in part to the industry struggling to recoup from a series of years marked by high combined ratios, and more recently, the fallout of the September 11, 2001 terrorist attacks (National Conference on Insurance Legislators, 2002). Others report the tightening is due in part to the fact that in the mid-1990s, workers' compensation insurers cut premiums and

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<sup>17</sup> The Federal Employment Compensation Act (F.E.C.A) provides workers' compensation insurance for non-military, federal employees; the Federal Employment Liability Act (F.E.L.A.) for railroads and their employees; the Merchant Marine Act (the Jones Act) for seamen; the Longshore and Harbor Workers' Compensation Act (LHWCA); and the Black Lung Benefits Act provides compensation for miners suffering from "black lung" disease.

<sup>18</sup> California currently is in the process of a major re-engineering of its workers' compensation system.



engaged in an all-out price war to win market share, feeding off high investment returns. Then the stock market crashed and, simultaneously medical costs rose dramatically (LRA, 2003).

In 1986, 870 private commercial insurers actively wrote workers' compensation insurance in the U.S. In 2003, 791 commercial insurers actively wrote workers' compensation insurance, a nine percent reduction in total carriers (A.M. Best, 1997 and 2003). One result of the tightening of the U.S. workers' compensation insurance market reported by workers' compensation and insurance agency staff has been an increase in the number of employers obtaining workers' compensation insurance through jurisdictions' residual markets.

There has been a recent increase in the number of household employers electing to cover their domestic service workers, and in particular, PAS workers, for workers' compensation. Twenty-five states' and two U.S. territories' workers' compensation laws exempt domestic service workers (see Table 1). All but one state (Wyoming) allow household employers to elect to cover their domestic service workers. State workers' compensation agency staff recently reported:

*Five years ago I could not tell you what the employment classification codes for domestic service were or what tasks were included under the codes. Now we are seeing an increase in household employers electing workers' compensation insurance coverage for their domestic service workers. If this trend continues, we need to make sure the policies and procedures for classifying and rating domestic service, and in particular, personal assistance service workers accurately reflect the tasks performed and the associated risk.*

Some state workers' compensation agency staff reported that some insurance agents/producers are reluctant to broker workers' compensation insurance for household employers with voluntary and residual carriers. This is due, in part, to low administrative fees (e.g., \$15-20 per policy) and significant administrative burden and related costs.

It also was reported that the majority of voluntary insurance carriers are reluctant to write policies for household employers due to small payrolls, low premiums, significant administrative burden and related costs and perceived high risk of worker injury. As a result, state workers' compensation and insurance agency staff are seeing an increase in the number of domestic service policies written by the state's residual workers' compensation insurance market.

A market conduct examination of the statistical reporting and experience rating procedures of the National Council on Compensation Insurance, Inc. (NCCI) under the examination authorities of the Oregon Insurance Division and twelve other participating insurance departments<sup>19</sup> was performed by Arthur Andersen, LLP in 2001. Two findings of the review, (1) questionable classification code assignments and (2) employee

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<sup>19</sup> AK, AR, DC, IL, IA, KS, ME, NC, RI, UT, WI, and VT.

misclassification, were attributed, in part, to the current employment classification code system being confusing and difficult for employers and insurers to use (Arthur Andersen, LLP, 2001).

As a result of the Arthur Andersen review, NCCI has implemented a new Classification Assurance Department that is focused on “systematic research, analysis and maintenance of NCCI’s classification system to ensure it remains healthy, viable and responsive to the needs of the industry (NCCI, 2003). NCCI’s research plan includes a review of codes related to personal care services. This review is forthcoming according to NCCI staff as of December 2003.

## **B. What Are Workers’ Compensation Laws?**

Workers’ compensation laws define the responsibilities of the employer to provide prompt medical, disability and other benefits (e.g., death and burial) for injuries sustained on the job by workers, resulting in partial or total incapacity or death. In return, the employer is shielded from tort liability for those injuries (Lencsis, 1998). All 50 states, the District of Columbia, the five U.S. territories and the Navajo Nation have enacted workers’ compensation laws (see Table 1).

Workers’ compensation laws are either *compulsory* or *elective*. Under an elective law, the employer may accept or reject the law, but if rejected, the employer loses the three common law defenses – contributory negligence, assumption of risk, and negligence of fellow employees. Practically, this means that all laws, in effect, are “compulsory”<sup>20</sup> (see Table 1) (US. Chamber of Commerce, 2002).

A compulsory law requires each employer within its scope to accept its provisions and provide for benefits specified (U.S. Chamber of Commerce, 2002). The majority of jurisdictions’ workers’ compensation laws are compulsory and in general, employers are required to purchase insurance at no cost to the employee. Employers who do not obtain insurance for their non-exempt employees are considered out of compliance with the law and may be subject to penalties and at risk of tort liability (see Table 2).<sup>21</sup>

Twenty-three states permit employers to waive their inclusion in the state’s workers’ compensation law under certain circumstances by obtaining a waiver.<sup>22</sup> In addition, 49 states, the District of Columbia, and the five U.S. territories allow household

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<sup>20</sup> Texas is the only state that allows employers to elect whether or not to provide coverage (§406.002-Coverage Generally Elective). However, public employers and employers that enter into a building or construction contract with a government entity must provide coverage.

<sup>21</sup> For example, in New York, if an employer has not secured the necessary workers’ compensation insurance, he/she is personally liable to pay all causally related medical bills as well as weekly benefits and is also liable for statutorily mandated assessment penalties. Furthermore, the failure to secure the payment of compensation is a misdemeanor, punishable by a fine of not less than \$500 or more than \$2,500, or imprisonment for not more than one year or both (NY WCL @ 52(1)(a)).

<sup>22</sup> U.S. Department of Labor, Table 1: Type of Law and Insurance Requirements for Private Employment.

employers to elect to provide workers' compensation coverage for their domestic service workers if they are considered exempt employees (see Table 1).<sup>23</sup>

1. What Are The Basic Objectives And Underlying Premise Of Workers' Compensation Laws?

There are six basic objectives underlying workers' compensation laws:

- To provide sure, prompt and reasonable medical and disability benefits to work-accident victims or income benefits to their dependents, regardless of fault;
- To provide a single remedy and reduce court delays, costs and workloads arising out of personal injury litigation;
- To relieve public and private charities of financially draining incidents associated with uncompensated industrial accidents;
- To eliminate payment of fees to lawyers and witnesses as well as time consuming trials and appeals;
- To encourage maximum employer interest in safety and rehabilitation through appropriate experience-rating mechanisms; and
- To promote frank study of the causes of accidents (rather than concealment of fault), thereby reducing the number of preventable accidents and consequent human suffering (U.S. Chamber of Commerce, 2002).

An underlying premise of workers' compensation laws is that the costs of industrial accidents and diseases, like other costs of doing business, should be borne by the enterprise that engendered them. (King, 1988). Accordingly, the right to workers' compensation benefits depends on the relationship of the injury to the victim's work. There is no requirement that the employer have been "at fault." (King, 1989).

There are two benefits for employers under workers compensation law. First, the remedies available (and the amount of the employer's liability) under the workers' compensation statutes are generally limited to medical, disability, death and burial benefits. There is no right to damages for pain and suffering or punitive damages in most states. In addition, workers' compensation disability, death and burial benefits are typically subject to ceilings limiting potential recovery. Workers' compensation benefits are usually paid periodically, as compared to lump sum recoveries in tort cases. Second, an employee's right to workers' compensation is usually the *exclusive remedy* against the employer for accidental injuries and occupational diseases falling within the coverage formula of the workers' compensation act (King, 1988).

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<sup>23</sup> The State of Wyoming's exclusive State Insurance Fund does not allow household employers to elect to provide workers' compensation insurance for their domestic service workers.

There are some situations where the worker may maintain a tort action. First, the immunity granted to the employer is not absolute. The employer is not immune when he intentionally injures an employee. In addition, some jurisdictions permit a tort action when an employer acts in a “dual capacity” with respect to an employee (Haas, 1989).<sup>24</sup>

Second, should the workplace injury involve a person other than the employer, that victim is entitled to sue the third party in tort. Although there are variations, the general rule is that the tortfeasor pays the entire judgment to the victim and the employer is reimbursed for any workers’ compensation he has paid so that the victim does not receive a “double recovery.” So, even when the employer can be shown to have been negligent, he may not have to pay anything for the work-related injury (Haas, 1989).

## 2. How Do Workers’ Compensation And Tort Law Differ?

Some consider workers’ compensation a historic outgrowth of tort law. The two systems have similar goals, but there are significant differences between them in both their substantive and procedural rules. They also interact in various ways, most notably in the immunity from tort liability that workers’ compensation statutes grant employers (Haas, 1987).

There are three primary differences between workers’ compensation and tort law:

- First, unlike tort law, workers compensation is a no fault system. As long as the injury occurs from his/her employment and occurs in the course of work, a worker is entitled to compensation. Compensation does not depend on demonstrating that the employer was at fault, nor is it denied because the worker was at fault, except in extreme cases (Haas, 1987).
- Second, unlike tort law, workers’ compensation does not try to compensate the accident victim for the full value of his loss and does not try to make the worker “whole.” Instead, workers compensation replaces pecuniary losses incurred by the victims of work-related injuries. Workers’ compensation insurance fully covers the injured workers’ medical expenses, but only partially covers lost wages. In addition, it does not include any amounts for the injured worker’s “pain and suffering” nor does it include amounts for the loss of consortium<sup>25</sup> suffered by the worker’s spouse or children. Assuming the worker’s injury entitled him/her to recovery in tort, it is generally true that the tort judgment would be significantly higher than the workers’ compensation award (Hass, 1987).

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<sup>24</sup> Under the dual capacity doctrine an employer apparently protected by the exclusive remedy principle may become liable to the employee in tort if, in respect to that tort, he or she occupies a position which places upon him obligations independent and distinct from his role as an employer (2A Larson, Workmen’s Compensation 72.80, at 14-112). An example of *dual capacity* is when the employer is liable as the employer and also as the manufacturer of the product that proves to be faulty. One scenario might be the liability related to an organization that makes its own ladders and has a worker injured as a result of a ladder breaking underneath him/her as a result of faulty construction.

<sup>25</sup> Consortium in this case refers to “fellowship or companionship.”

- Third, the two systems differ in response time. Workers' compensation is designed so that the qualifying victim receives payment soon after his/her injury. In a tort action, it can be months and perhaps years before the plaintiff can receive a judgement (Haas, 1987).

Regardless of the differences, the basic goals of the two systems are similar. Both systems' goals are to compensate victims of accidents and both place the cost of such compensation, at least in the first instance, on the entity with a close causal relation to the injury. To the extent that the payer is able to modify the work situation that gave rise to the injury, the payment has a deterrent effect. It provides the payer and potential payers with an incentive for taking safety measures (Haas, 1987).

### 3. How Does An Employer Come Into Compliance With Workers' Compensation Laws?

"Compliance" with workers' compensation laws is a special term that refers to activities that an employer must do or refrain from doing under the law, other than paying benefits for compensable accidents. First, the employer must comply by either purchasing insurance to cover the entire liability under the law or qualifying as a self-insurer under the applicable rules. The latter option is rarely, if ever, available to household employers (Lencsis, 1998).

Second, in many states, employers must post a prescribed notice in a conspicuous place such as an employee bulletin board, in each place of employment. The notice usually advises the workers of the name of the employer's current carrier and provides further information about how to make a claim (Lencsis, 1998).

Third, employers often are required to file a written report to the workers' compensation administrative agency for every significant employee injury. Fourth, employers are often obligated to refrain from discriminating in any way against an employee who has claimed compensation or has been a witness in a compensation case. Finally, many laws provide that an employer may not enter into any agreement with an employee regarding a waiver or surrender of compensation benefits (any such agreement will be unenforceable) (Lencsis, 1998).

### 4. Should Non-business Employment Be Covered Under Workers' Compensation? The Case Of Domestic Service

As discussed earlier, whether non-business employment (e.g., domestic service) should be covered for workers' compensation is a subject for debate. From a social policy perspective it has been argued that the ultimate goal of workers' compensation should be protection for all employees since the losses due to injury for a non-business or domestic worker is no less serious than for an industrial worker (Larson, 2002). Moreover, the 1993 Social Security Bulletin Annual Statistical Supplement goes as far as to say, "Workers' compensation was the first form of social insurance to develop widely in the United States."

Others argue that workers' compensation insurance is a "business insurance" and that the associated costs are a "business expense." As such, the cost of insurance should be passed along to the customer in the price of the product. In the case of non-business or domestic service, employees do not perform tasks in the course of a trade, business, profession or occupation of their employer. As a result, the household employer must assume the total cost of insurance directly.<sup>26</sup> Larson, a national expert on workers' compensation law, argues that non-business or domestic service employment should be exempt from workers' compensation laws (Larson, 2002). To date, many jurisdictions have followed this logic, exempting many categories of non-business employment including domestic service (see Table 1).

Due to the uncertainty some employers face in determining whether certain employees are truly exempt from the law,<sup>27</sup> all states and territories, with the exception of Wyoming, allow employers to elect to provide coverage for employees who are considered exempt. When an employer elects to provide coverage, states often require coverage be provided for all employees and that the employer formally notify the jurisdiction's workers' compensation administrative agency of his/her intent to provide or terminate coverage for exempt employees.

#### 5. How Are Domestic Service And Personal Assistance Service Defined Workers' Compensation Laws?

In general, domestic service and personal assistance services are not well defined in workers' compensation laws. Forty-five states and five territories do not define domestic service in the definition section of their workers' compensation laws (see Table 7). These jurisdictions basically rely on the definitions included in the NCCI and state-specific domestic service employment classification codes to define the occupations and tasks included under domestic service including personal assistance services. For the six states who specifically define domestic service in their workers' compensation law<sup>28</sup> (see Table 7), two states make no mention of PAS workers (NV and MI) in the law, two states include personal assistance in the domestic service definition (HI and OR) and two

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<sup>26</sup>Except Washington State and Oregon. Under Washington State law, a portion of the workers' compensation insurance premium, equal to one-half of both the medical-aid rate and supplemental-pension assessment may be paid by employee contribution. The Department of Labor and Industries does not collect each worker's share directly. Instead, employers have the option to collect their employees' portion through payroll deductions. Oregon has implemented the Workers' Benefit Fund Assessment ("Cents-Per-Hour") Rate to pay for certain programs that provide direct benefits to injured workers and their beneficiaries. In 2003, the assessment rate was 3.6 cents per hour or partial hour worked by each paid employee that an employer provides with workers' compensation insurance coverage. Employers contribute at least half (1.8%) deducting no more than half of it (1.8%) from workers' wages. Employers then submit the total to the state through Oregon Combined-Payroll-Tax Reporting System.

<sup>27</sup> The definition of domestic service is unclear and does not include personal assistance in the definition. Moreover, domestic service classification codes developed by NCCI and by jurisdictions often are vague and use antiquated terminology. Often the final ruling on the exempt status of a worker can only be determined based on a claims appeal decision.

<sup>28</sup> HI, MI, MN, NV, NH and OR.

states specifically exclude personal assistance from the definition of domestic service if the services are provided to persons with disabilities (New Hampshire and Minnesota).

Hawaii's workers' compensation law §381-1(6), for example, defines domestic service to include "attendant care and day care services authorized by the Department of Human Service." Oregon's workers' compensation law §656.026(1), in contrast, defines domestic service to include "home health workers." New Hampshire's workers' compensation laws define domestic service to not including workers employed by individuals with disabilities.<sup>29</sup> In the case of Minnesota, individuals with disabilities whose workers receive payment for services rendered directly from the Department of Human Services are considered the employees of the state and not the household employer.<sup>30</sup>

#### 6. Are Family Members Considered "Covered" Workers Under Workers' Compensation Laws?

A key feature of self-directed support service programs is that certain family members may be permitted to be paid support service workers for elders and individuals with disabilities.<sup>31</sup> However, a family member, performing as a paid PAS worker, could be injured while providing personal assistance to their disabled or aged relative the same as a non-related worker. Therefore, a key question for self-directed support service programs is, under what circumstances are family members considered "covered" workers under worker's compensation laws?

Workers' compensation laws in 38 states, the District of Columbia and four U.S. territories are silent regarding the status of family members as "covered" employees (see Table 7). Therefore, it is assumed in those jurisdictions that family members are "covered" employees under the respective laws. State workers' compensation laws in California, Hawaii and Idaho specifically exempt certain family members from coverage. In California, household employers may not elect to provide coverage for exempt family members, however, in Hawaii and Idaho, household employers may elect to cover exempt family members.

Nine jurisdictions have specific provisions for certain types of family members (Table 7). For example:

- In Connecticut, if, in any contract of insurance, the wages or salary of a member of the employer's family dwelling in his or her home is included in the payroll on which the premium is based, then that person will be deemed an

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<sup>29</sup> New Hampshire Title XXIII 281A:2 V-b(b).

<sup>30</sup> MN Statutes 2002 §176.011 subd. 9(17) states "a worker who renders in-home attendant care services to a physically handicapped person, and who is paid directly by the commissioner of human services for these services, shall be an employee of the state within the meaning of the subdivision, but for no other purpose."

<sup>31</sup> Two of the three RWJ Cash & Counseling Program Demonstration states (FL and NJ) allow family members to be paid support service workers.

employee and compensated in accordance with the statute if they sustain an injury arising out of and in the course of his employment.<sup>32</sup>

- Iowa workers' compensation law exempts "members of the household" from coverage. The State defines a "member of the household" "as a spouse or relative of the employer, or a relative of the spouse residing in the household of employment."<sup>33</sup> These individuals are ineligible to be covered under workers' compensation in Iowa. Staff could not confirm if household employers could elect coverage for these individuals.
- In Kansas, no wages paid to an employee who is a member of the employer's family by marriage or consanguinity can be used in the computation of gross annual payroll for workers' compensation purposes.<sup>34</sup> In Maine, a parent, spouse or child of a sole proprietor, partner or bona fide owner of 20 percent of the voting stock may waive in writing all the benefits provided by workers' compensation.<sup>35</sup>
- Michigan's workers' compensation law §118(1) states that no household domestic servant shall be considered an employee if the person is a wife, child or other member of the employer's family residing in the home.
- Missouri Revised Statutes §287.030(3) states "...an employee who is a member of the employer's family within the third degree of affinity or consanguinity shall be counted in determining the total number of employees of such employer." Domestic service workers, including paid family members, are exempt from the workers' compensation law in Missouri. However, household employers may elect to cover these workers, including family members who are paid employees. In addition, Missouri Division of Workers' Compensation staff volunteered that if a household employer elected to cover their domestic service workers for workers' compensation, and had family members as paid employees, the insurance company would probably require that the family member be covered under the policy along with any other non-related employees.
- North Dakota specifically prohibits spouses and children under the age of 22 from being considered a covered employee for the purpose of workers' compensation.<sup>36</sup> In Oklahoma, an employee with five or less employees, all of whom are related by blood or marriage to the employer are exempt from the State's workers' compensation law. However, employers have the option of electing to provide coverage for these employees.<sup>37</sup>

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<sup>32</sup> CT Revised Statutes §31-275(9)(b)(iii).

<sup>33</sup> IA Code 2003, Section 85.3(b)(1).

<sup>34</sup> K.S.A. §44-404(a)(2).

<sup>35</sup> ME Title 39-A§102(11)(4).

<sup>36</sup> North Dakota Century Code 65-01-02 Definitions (17)(b)(3).

<sup>37</sup> OK Title 85 §2.6.



- Vermont does not consider members of the employer's family dwelling in his/her house to be employees under the State's workers' compensation law. However, "if in any contract of insurance, the wages or salaries of a member of the employer's family dwelling in his house is included in the payroll on which the premium is based, then such person must, in the event of his or her sustaining injury arising out of and in the course of his/her employment, be deemed an employee and compensated accordingly."<sup>38</sup>

When designing self-directed support service programs that allow family members to be paid support workers, it is important for jurisdictions to understand how family members are treated for workers' compensation purposes so that the service recipients' risk of liability for worker injury can be minimized. In jurisdictions that exempt family members from the workers' compensation law but allow employers to elect coverage, self-directed support service program administrators may want to consider arranging and paying for workers' compensation insurance for these workers. In jurisdictions that exempt family members from the workers' compensation law with no option for electing insurance coverage, this could result in a potential risk of liability for worker injury in the tort system.

### **III. HOW DO WORKERS' COMPENSATION PROGRAMS WORK?**

It is important to have a basic understanding of how workers' compensation programs work in order to assess how they apply to household employers of domestic service and PAS workers of individuals enrolled in self-directed support service programs. The following describes the key characteristics of workers' compensation programs.

#### **A. What Organizations Administer Workers' Compensation Systems?**

The functions associated with operating workers' compensation systems often are disbursed across a number of public and private entities and the number can vary significantly by jurisdiction. For example, in Alabama,<sup>39</sup> two state agencies administer the workers' compensation systems, whereas in Oregon, at least seven public entities and one private entity participate in administering the state's workers' compensation system.<sup>40</sup>

There are two primary functions that public and/or private entities perform related to the operation of workers' compensation systems, administration and rating setting. The administrative function may be broadly divided into administering the law and system (e.g., making sure that all covered employers have obtained workers' compensation insurance for their workers) and conducting hearings for the resolution of

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<sup>38</sup> VT Statutes §601(14)(D).

<sup>39</sup> The Workers' Compensation Division of the AL Dept of Industrial Relations and the AL Department of Insurance. AL uses the court system to process workers' compensation claims appeals.

<sup>40</sup> Under the OR Dept of Consumer and Business Services, the Workers' Compensation Division, Workers' Compensation Board, Workers' Compensation Management – Labor Advisory Committee, Ombudsman for Injured Workers, Ombudsman for Small Business, Insurance Division and the State Accident Insurance Fund Corporation and NCCI are involved in managing the workers' compensation program in Oregon.

both claims and insurance disputes. Industrial commissions or divisions of workers' compensation usually administer the law and system. In some instances, two state agencies may manage the administrative functions separately, one agency administers the law and system, making sure covered employers have insurance and overseeing and/or disbursing benefits, and the other resolves conflicts (e.g., initial claims disputes and appeals) (e.g., Oregon). These state agencies often have concurrent jurisdiction over claims, with the adjudicating board having superior power. In Alabama and Tennessee, courts administer the claims appeal function (see Table 8) (Nackley, 1989).

Evidence rules for workers' compensation administrative hearings are different from those applied in courts, and the scope of judicial review is often narrow. Court review generally is limited to determinations of whether the administrative agency abused its discretion, made factual findings without evidentiary support, or made an error in law. In those few states that permit *de novo* review in court, the court rules of civil procedure usually obtain, but the issues that may be appealed are often limited to allowance of claims or of medical conditions (Nackley, 1989).

Wisconsin is a good example to illustrate the process some states use to resolve claims disputes and appeals. In Wisconsin, the administrative law judges for the Wisconsin Department of Workforce Development, Workers' Compensation Division first review and render a decision on a particular issue when a claim is disputed. If the decision is appealed, it is first heard by the Wisconsin Labor and Industry Review Commission. In the event of a second appeal, the case goes to the State Circuit Court. The State Circuit Court decision may then be appealed to the State Appeals Court and then finally to the State Supreme Court.

The rate setting function may be performed by a State Insurance Fund or department of insurance (see Table 8). The primary responsibility of state departments of insurance is to regulate the insurance industry in a particular jurisdiction. Tasks may include, but are not limited to, enforcing insurance laws, in particular as they pertain to workers' compensation, and overseeing, regulating, licensing, investigating and auditing insurance companies to ensure they remain solvent and meet their obligations to policyholders and for licensing and investigating insurance agents/producers. State insurance departments also are responsible for reviewing and approving insurance carriers' policies and procedures, forms, and other filings including workers' compensation loss cost multipliers and rates. They may also be responsible for reviewing and approving rating agencies' rate analyses and filings, conducting hearings, assisting in the resolution of rate disputes and complaints from consumers about insurance companies and agents and providing educational information and assistance to consumers and other interested parties.

Some insurance departments delegate the data analysis and rate setting function to rating bureaus or advisory organizations. These entities collect and analyze data and prepare and rate information and rate filings to the insurance agency for review and approval. The insurance department often conducts regulatory hearings on the proposed rate filings as part of its approval process (Lencsis, 1998).

The largest rating bureau/advisory organization in the United States is the National Council on Compensation Insurance (NCCI), Inc. NCCI operates as a not-for-profit rating, statistical and data management service organization.<sup>41</sup> NCCI products and services assist insurers, regulatory officials, lawmakers, and other industry stakeholders in making informed decisions that support the efficient economic functioning of the workers' compensation system (NCCI, 2003). NCCI currently has approximately 900 affiliates and performs rating and other functions<sup>42</sup> for approximately 40 states and the District of Columbia. NCCI does not provide services to any of the U.S. territories. Despite its name, NCCI is not associated with the federal government and does not operate in all states (NCCI, 2003).

There are eleven states that operate independent (e.g., single state) rating or advisory organizations and perform similar functions as NCCI.<sup>43</sup> Because of the structure of the State's rating laws, Texas has no rating or advisory organization nor do the seven jurisdictions that operate exclusive (e.g., monopolistic) state insurance funds where private workers' compensation is not available (Lencsis, 1998).

## **B. What Benefits Are Provided To Injured Employees Under Workers' Compensation?**

There are a number benefits provided to injured employees under workers' compensation. They include:

- Medical,
- Disability (income to replace lost wages),
- Scheduled Awards for Selected Injuries,
- Rehabilitation
- Survivor' Benefits, and
- Funeral Expenses.

### **1. Medical Benefits**

All workers' compensation laws have one feature in common: they provide medical benefits that are unlimited in dollar amount and in time. They provide full compensation for employee injuries. As a result, medical benefits can be a very costly component of the claim from the insurer's or self-insured employer's perspective (Lencsis, 1998).

Although the term "medical" might strictly mean only services provided by physicians and hospitals, medical benefits in most jurisdictions include the services of dentists, chiropractors, podiatrists, psychologists, and other health care professionals.

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<sup>41</sup> NCCI initially was an unincorporated association, however, in the mid-1990s, it became a not-for-profit corporation.

<sup>42</sup>For example, NCCI compiles and updates the National Scopes Manual of employment classification codes and administers the assigned risk plan in 18 states and the District of Columbia.

<sup>43</sup> CA, DE, HI, IN, MA, MN, NJ, NY, NC, PA, WI.

Medical benefits include not only reimbursement for professional service and hospital stays, but also items of expense associated with various kinds of health care, such as diagnostic tests, wheelchairs and crutches, prosthetic devices, other medical appliances, and medications (Lencsis, 1998).

In approximately half the jurisdictions, in order to reduce fraud, there are restrictions regarding the health care provider an employee can choose. In some jurisdictions, the employer is entitled to designate the provider at all stages of treatment, and in others, the employer may initially designate providers, subject to the employee's right to change providers later during the course of treatment, for personal or other reasons. In a number of jurisdictions, medical benefits are further restricted by the use of fee schedules for physicians and other practitioners (Lencsis, 1998).

## 2. Disability Benefits

The second most important benefit is the disability<sup>44</sup> benefit. The worker is entitled to cash benefits to replace his or her lost income, generally for an indefinite period if the disability lasts that long. However, not all workers will receive this type of compensation because disability benefits are always subject to maximum amounts, which provide more than a subsistence level of income in many cases, but do not fully replace workers' income in other cases. Disability benefits are usually calculated at 2/3<sup>rd</sup> of pre-accident wages, subject to a maximum that varies by jurisdiction. In most states, the maximum is a function of an average wage that is derived from labor statistics. In some states (e.g., New York), the maximum is a fixed dollar amount (Lencsis, 1998).

Disability benefits may be payable for total disability (usually defined as a complete loss of wage-earning capacity, not just with reference to medical or physical incapacity) or for partial disability (e.g., reduction in wage-earning capacity due to the injuries sustained). Benefits are further categorized as *temporary* when an end to the period of disability is foreseeable and as *permanent* when the disability is expected to endure indefinitely or for the employee's remaining lifetime (Lencsis, 1998).

## 3. Scheduled Awards For Selected Injuries

Scheduled awards for selected injuries are fixed amounts payable to the injured worker for the loss or loss of use of certain body parts and functions. They represent payment for a presumed permanent disability, regardless of any actual lost wages, and they include some component of an award for pain and suffering, or the closest thing to such a component that exists in the workers' compensation field (Lencsis, 1998).

Maximum scheduled awards vary by jurisdiction. Some jurisdictions<sup>45</sup> do not use scheduled awards and pay benefits according to the actual degree of impairment of the injured worker in each case. Some laws provide for the award to be paid in a lump sum under some circumstances, but it is more common that the award is paid out over a

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<sup>44</sup> Also commonly referred to as the income, indemnity, or wage-loss benefit.

<sup>45</sup> FL, ME, MN, MT, NV, VT, and WY.

number of years. Finally, jurisdictions differ in their treatment of temporary disability together with schedule award. Depending on the jurisdiction, the temporary disability benefit can be paid in addition to the scheduled award with or without limitation, or it may be deducted from the scheduled award (Lencsis, 1998).

#### 4. Survivors' And Funeral Benefits

Since workers' compensation represents a substitute for tort remedies, it provides benefits to surviving spouses and dependent relatives of workers who die as a result of work-related accidents. Benefits are usually paid at the same rate as would apply if the worker were totally disabled. Payment to a spouse may be for as long as the spouse's lifetime, but it is very common for spouse's benefits to terminate with a lump-sum payment of two-years' compensation upon his/her remarriage. Benefits to surviving children usually end at age 18 or 19 with an extension to age 23, 24, or 25 if the child is still a full-time student. Different jurisdictions provide for different adjustments when a spouse and one or more children survive the deceased worker. Finally, each jurisdiction's law provides a funeral expense or burial allowance for a deceased worker that varies by jurisdiction (Lencsis, 1998).

#### 5. Rehabilitation Benefit

Rehabilitation of injured workers is normally divided into two categories: physical or medical rehabilitation and vocational rehabilitation. Physical or medical rehabilitation refers to the regaining of full use of the body. Vocational rehabilitation refers to retraining and counseling in connection with the resumption of employment. The costs of rehabilitation of injured workers are frequently compensable in addition to medical benefits per se (Lencsis, 1998).

Many jurisdictions specifically require insurance carriers to provide one or the other, or both types of rehabilitation. Many jurisdictions also impose an obligation upon an injured employee to accept certain rehabilitation services as a condition to the continued receipt of full compensation benefits. Jurisdictions vary in their requirements related to the rehabilitation benefit (Lencsis, 1998).

#### 6. Non-Taxability Of Benefits And Protection From Creditors

Medical and disability benefits have traditionally been exempt from federal income taxes. This approach anticipates the fact that the payment is a reduced amount compared to what a worker would have received if they were on the job receiving full wages. In some cases these benefits are also exempt from personal income taxes in a given jurisdiction (Lencsis, 1998).

One of the social purposes of workers' compensation is the prevention of destitution. As a result, workers' compensation income benefits are invariably made exempt under state laws from creditors of the worker. These exemptions usually only

apply to creditors who obtain a money judgment for contractual debts or for other reasons such as negligence in an accident situation (Lencsis, 1998).

### **C. What Insurance Markets Provide Workers' Compensation Insurance?**

The insurance markets from which an employer can obtain workers' compensation insurance are:

- Voluntary insurance market (private insurers),
- State insurance funds (both exclusive and competitive),
- Residual insurance market,
- Self-insurance,
- Workers' compensation endorsements on homeowner's and tenant's insurance, and
- Alternative workers compensation plans.

However, most household employers do not meet jurisdictions' requirements to self-insure for workers' compensation. The following describes the key features of these markets and the self-insurance and the homeowner's insurance options for providing workers' compensation to household employers.

#### **1. Voluntary Insurance Market**

The voluntary insurance market is comprised of private insurers who may volunteer or decline to write policies for employers based on their own underwriting criteria. In 2002, there were 791 private commercial insurers actively writing workers' compensation insurance in the U.S. (A.M. Best Co., 2003). The number of active carriers was down from 870 in 1996, a nine percent reduction in industry capacity. The tightening of the voluntary insurance market is due, in part, to some mergers in the industry (e.g., Zurich Insurance Group and Farmers Insurance) and a number of economic and industry-related issues. Five states<sup>46</sup> reported that access to voluntary workers' compensation insurance was "non-existent" for household employers in their states.

Companies writing workers' compensation insurance may be organized as a stock, mutual or a reciprocal insurer (Lencsis, 1998). Table 9 includes a list of the top 25 commercial insurers writing workers' compensation based on 2002 premiums. The leading workers' compensation insurer in 2002 was the State Compensation Insurance Fund (SCIF) of California. The SCIF in California is a non-profit, public enterprise fund that operates much like a mutual insurance carrier and competes in the voluntary workers' compensation insurance market. In California workers' compensation insurance for domestic service workers (outside a homeowner's insurance policy), can only be purchased from the SCIF.

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<sup>46</sup> AR, FL, NH, NM, and NC.

Forty-five states, the District of Columbia and three U. S. territories have a voluntary market for workers' compensation insurance and in many jurisdictions the number of insurers authorized to write workers' compensation is significant (Table 3).<sup>47</sup> However, the majority of jurisdictions reported that access to the voluntary market for small employers, and in particular household employers who employ domestic service workers, is limited (see Table 3).

Writing workers' compensation in jurisdiction's voluntary market usually involves three distinct activities:

- Writing policies voluntarily,
- Participating in the state's residual market as an assigned carrier or as a member of a pool that reinsures assigned risks, and
- Possibly participating in the residual market as a volunteer service carrier (Lencsis, 1998).

In the simplest case, an insurance carrier will write a certain amount of voluntary premium and pay assessments based on its market share to cover losses generated by the insured included in the state's assigned risk pool. As an alternative, the carrier might agree to accept direct assignments. Many large insurers may wish to participate as servicing carriers, where they earn a fee for issuing policies and paying claims that are completely reinsured by a pool consisting of all licensed carriers in the state (Lencsis, 1998).

Included in the voluntary insurance market is a "default" market that has emerged over the past ten years in response to concerns that small and moderate sized employers had limited access to workers' compensation insurance outside the residual market. Some are competitive state insurance funds and others may be mutual insurance companies developed specifically to service this population. For example, the State of New Mexico funded the initial development of New Mexico Mutual Insurance Company. An objective of the Company is to service small and moderate sized employers. Operationally, the State made the initial investment to start the mutual insurance company. Then New Mexico Mutual Insurance Company reimbursed the State for its initial investment over a five-year period. Although many have either an explicit or implicit mission to serve small to moderate sized business, their willingness to serve household employers varies by organization.

## 2. State Insurance Funds

State Insurance Funds are quasi-governmental insurance entities that provide either the sole or an optional source of workers' compensation in a jurisdiction. State Insurance funds are either exclusive (some call "monopolistic") or competitive (see Table 10).

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<sup>47</sup> These figures include the competitive state insurance funds.

Currently, five states and two U.S. territories have Exclusive State Insurance Funds.<sup>48</sup> They are called exclusive because they are generally the only permitted source of workers' compensation insurance in a jurisdiction (e.g., private carriers may not write policies in these jurisdictions). In these jurisdictions the state insurance funds act more like a government benefit program than a business insurance program (Lencsis, 1998). Wyoming is the only state that operates an exclusive state fund that does not allow an exempt employer (e.g., household employer of domestic service workers) to elect to purchase workers' compensation insurance for his or her workers.

Competitive Insurance Funds are primarily governmental or quasi-governmental entities that write workers' compensation insurance in competition with private insurers (Lencsis, 1998). Nine jurisdictions have "Competitive" State Insurance Funds.<sup>49</sup> Some State Insurance Funds are not permitted to refuse coverage to an employer, no matter how undesirable the risk, so long as past and current premiums are paid (e.g., PA State Workers' Insurance Fund). Others often have an explicit or an implicit mandate to serve small or moderate sized employers (e.g., AZ, OR) but may be able to refuse coverage in accordance with approved policies (e.g., State Compensation Fund of Arizona). For example:

- The State Compensation Fund of Arizona can refuse to write a policy for an employer based on approved policies and procedures. In this case, the employer has to go to the state's Assigned Risk Plan to obtain coverage where they cannot be refused coverage.
- The Pennsylvania State Workmen's Insurance Fund (SWIF) has a program and an insurance policy specifically for domestic service workers (PA Domestic Service Exemption Policy). The PA SWIF has streamlined the application process and has delegated a knowledgeable and customer-oriented staff person to address issues pertaining to the Domestic Service Exemption Policy.
- In California, the State Compensation Insurance Fund is the only insurer that writes standard workers' compensation insurance policies for the domestic service classification. However, the Fund can require a household employer to demonstrate that he/she was unsuccessful in obtaining coverage through his/her homeowner's insurance policy first before the Fund will provide coverage under a standard workers' compensation policy.

Often competitive state insurance funds refer to themselves as the "insurer or market of last resort." In some cases, they operate as the sole insurer for the residual market (e.g., Pennsylvania SWIF). Other times, a Fund may operate in addition to the jurisdiction's Assigned Risk Plan (e.g., State Compensation Fund of Arizona as described above and the Arizona Assigned Risk Plan administered by NCCI).

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<sup>48</sup> ND, OH, WA, WV, WY, PR and VI.

<sup>49</sup> AZ, CA, ID, MD, MT, NY, OR, PA and VT.



Historically, state insurance funds typically did not sell or service policies through agents/producers and allowed employers to make applications directly. This eliminates a barrier for household employers to access insurance if agents/producers truly have little or no incentive to broker insurance applications with private or residual market insurers on behalf of household employers. Recently, this policy has begun to change with at least two state insurance funds (e.g., ID and MT) recommending that household employers consider using an agent to access insurance through the state insurance fund. Of all the competitive state insurance funds and mutual insurance companies currently acting as “markets/insurers of last resort,” the California State Compensation Insurance Fund reported the use of agents as “optional.” Six other states<sup>50</sup> recommend that household employers use an insurance agent/producer while three other states<sup>51</sup> require the use of an insurance agent/producer to access workers’ compensation insurance through the organization (see Table 10 and Table 11).

### 3. Residual Insurance Market

In general, the residual insurance market is a mechanism established by individual jurisdictions to ensure that employers can obtain workers’ compensation insurance even if insurance carriers are not willing to write such insurance on a voluntary basis. Jurisdictions’ residual markets operate either through Assigned Risk Plans or specific insurers operating as “insurers/markets of last resort” (see Table 11).

The basic concept underlying any Assigned Risk Plan (sometimes referred to as the “Pool”) is the sharing, in an equitable manner among all licensed insurers within a jurisdiction, of the pool or residue of risk that individual carriers do not wish to insure through the voluntary market because of their undesirable underwriting characteristics. In the case of workers’ compensation insurance, these characteristics may include, but are not be limited to, (a) a lack of or poor claims history, (b) deficient safety conditions in workplaces, (c) the small size of the business to be insured, and (d) the low level of approved rates generally in effect for the line of business (referred to as rate inadequacy) (Lencsis, 1998).

Assigned Risk Plans are generally authorized by statute and are filed with and subject to approval by the jurisdiction’s regulatory authority. Key components of these plans include: (a) assigning applicants to carriers, (b) plan administration, (c) determining whether employers are eligible for coverage under the law, and (d) developing and implementing policy issuance requirements (NCCI, 2003).

In jurisdictions that have an Assigned Risk Plan, every insurance company that writes voluntary insurance in the state must participate in the Assigned Risk Plan by assuming a proportionate share of the cost of providing for a market of last resort. This can be done through a variety of mechanisms, such as participating as a direct assignment carrier or participating in a reinsurance pool as a servicing carrier (NCCI, 2003).

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<sup>50</sup> HI, ID, ME, MO, MT, and RI.

<sup>51</sup> KY, LA, and MN.

A reinsurance pool is an agreement among carriers to share in the operating results (e.g., revenues and expenses) arising from the plan assignments to servicing carriers. In some jurisdictions the relationship is voluntary, whereas in others, it is mandated by statutes or regulation. The largest of these “pooling” arrangements is the National Workers’ Compensation Reinsurance Pool (NWCRP) (see Table 11) (NCCI, 2003).

Forty-five states and the District of Columbia have some type of residual market available to employers. However, none of the U.S. territories have residual workers’ compensation markets available to employers (see Table 11).

Twenty-nine states and the District of Columbia have Assigned Risk Plans. Twenty are administered by NCCI. The remainder are administered by various state rating bureaus or advisory organizations that have a contract with the state’s insurance department to manage the plan (e.g., TN-Aon Risk Services, FL-Florida Workers’ Compensation Joint Underwriting Association, Inc. and MI-the Compensation Advisory Organization of Michigan) (see Table 11).

Often, employers must obtain a certain number of refusals (e.g., declination letters) from carriers in the voluntary market in order to access the jurisdictions’ Assigned Risk Plan. This could be considered a barrier to the residual market for household employers. Currently, Michigan, North Carolina and Wisconsin do not require any refusals to access their Assigned Risk Plan and Minnesota and Oregon require one refusal. In addition, 18 states<sup>52</sup> and the District of Columbia require two refusals, Arizona, Idaho, Indiana, Kansas and New Jersey require three. Finally, Georgia requires four refusals to access the Assigned Risk Plan (see Table 11).

Some jurisdictions require an employer to use an insurance agent/producer to access workers’ compensation insurance through their Assigned Risk Plans. Some may see the use of agents as a way to facilitate access to an Assigned Risk Plan while others may see the requirement as a barrier. One reason why using an agent may be a barrier for household employers to access workers’ compensation insurance through an Assigned Risk Plan is that agents often have a disincentive to broker policies for individual household employers due to small fees and significant administrative effort. Twenty-two states<sup>53</sup> and the District of Columbia’s Assigned Risk Plans require employers to use an agent in order to access their Assigned Risk Plans. The majority of these Plans are administered by NCCI. Alaska, Arizona, and Delaware recommend using an agent, while Michigan, North Carolina, Wisconsin do not require an insurance agent be used to access the state’s Assigned Risk Plan (see Table 11).

Residual markets also may be implemented through an “insurer or market of last resort.” These entities often are competitive state insurance funds or mutual insurance companies that have a contract with the state to administer the residual market (e.g., MO and PA-SWIF). Twenty-one states have “insurers/markets of last resort” that perform as

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<sup>52</sup> AL, AK, AR, CT, DE, FL, IL, IA, MA, MS, NV, NH, NM, SC, SD, TN, VT, and VA.

<sup>53</sup> AL, AR, CT, FL, GA, ID, IL, IN, IA, KS, MA, MN, MS, NV, NH, NJ, NM, OR, SC, SD, VT and VA.

the residual market for jurisdictions (see Table 11). These entities provide insurance to all applicants and may assume the total risk of loss for the residual market up to some pre-determined amount. In the case of Missouri, Travelers Insurance is the agent, administrator and service carrier for the State's residual market. Travelers Insurance assumes all of the residual market risk up to a 100 percent loss ratio. Any additional losses are distributed across all of the insurers authorized to write workers' compensation in the State.<sup>54</sup> Five states<sup>55</sup> have both an Assigned Risk Plan and a "default" voluntary carrier ("insurer of last resort") that provides coverage to small and moderate-sized businesses (see Table 11).

#### 4. Self-Insurance

Under the self-insurance option, large employers, usually upon depositing a surety bond, are allowed to pay directly the claims filed by their own workers and are given a great deal of discretion in administering their own risks. Self-insured employers are required to pay their workers the same benefits as workers would receive under private insurance or the state insurance fund. Self-insurance is not an option for household employers due, in part, to payroll size and the significant fiscal and due diligence requirements imposed by state and territorial governments.

#### 5. Workers' Compensation Endorsements On Homeowners' And Tenants' Insurance Policies

Some jurisdictions provide household employers with the option of purchasing workers' compensation coverage for their domestic workers through an endorsement on their homeowner's, or, in some cases, tenant's insurance policies (see Table 12). Nineteen states,<sup>56</sup> the District of Columbia and two U.S. territories (AS and NMI) reported that household employers could obtain workers' compensation for their domestic service workers through this option (see Table 12). A least three states, (CA, NH, NJ) reported that availability of the homeowner's/tenant's insurance option was mandated by law.<sup>57</sup>

NCCI endorsements fall into two major categories: general and state endorsements. General endorsements are broken down into federal, maritime miscellaneous coverage, and exclusion, premium and retrospective rating. State endorsements relate to matters such as deductibles, cancellation and non-renewal, special rating plans, and employee leasing. An important endorsement within the miscellaneous category is the Voluntary Compensation and Employers Liability Coverage for Residence Employees Endorsement (WC 00 03 12 [Ed. 4-84]) (Appendix B). The endorsement was developed for use with Insurance Service Organization (ISO) homeowners' insurance policies, comprehensive personal liability policies or other policies that provide similar personal liability coverage. The endorsement provides voluntary compensation and

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<sup>54</sup> To date, this provision has never had to be implemented in Missouri.

<sup>55</sup> AZ, ID, MN, NM and OR.

<sup>56</sup> AZ, CA, CO, CT, HI, ID, IL, IN, IA, LA, MS, MT, NV, NH, NJ, NY, ND, SD, and VA.

<sup>57</sup> No specific information was available on legislation, coverage or rates for American Samoa.

employers liability coverage for domestic service when not covered by a standard workers' compensation policy.

NCCI has filed this endorsement for use in 39 states and the District of Columbia (see Table 12). However, 31 states (79.5%) reported either the endorsement was not being used or staff could not confirm that the endorsement was available for use. A number of states reported that property and casualty insurers (e.g., who typically write homeowners' and tenant's insurance) would be reluctant to write the endorsement, particularly if they did not have experience with workers' compensation insurance. Moreover, they knew of very few carriers that actually wrote this endorsement with any frequency.

Some states have their own statutes that mandate the availability of workers' compensation coverage for domestic service workers through a homeowners' (or in some states, tenant's) insurance policy. New Jersey Statutes Annotated Section 17:36-5.29, mandates that all homeowners' and tenant's insurance policies include workers' compensation endorsement for occasional domestic service workers. The premium is \$1.00/policy/year and covers occasional help (e.g., those who work less than 40 hours/week) working in and around the home. The endorsement also covers workers who may have occasional driving duties (e.g., taking the person to the store or doctor). A homeowner must inform their insurance carrier if they hire one or more full-time workers under the endorsement.

The annual policy fee for full-time domestic service workers under the homeowner's/tenant's insurance option is \$1 plus \$60/full time person hired /policy/year. The endorsement may be purchased from a voluntary insurance carrier or the residual market. Household employers also have the option of purchasing a standard workers' compensation insurance policy from the state's voluntary or residual markets.

California, Nevada, New Hampshire, New Jersey and New York and American Samoa mandate the availability of workers' compensation coverage for domestic service. Section 11590 of the CA Insurance Code mandates the availability of a workers' compensation endorsement for domestic service workers in a homeowner's insurance policy if coverage is not already available through a separate policy covering domestics. Carriers must submit their rating for this endorsement to the State Department of Insurance for approval. Carriers are permitted to modify the endorsement and the criteria for coverage (e.g., define the number of hours worked in order for a worker to be covered). The cost of the endorsement varies by carrier and carriers may choose not to write or renew an endorsement for a household employer based on specific policies.

In Nevada, Title 53, Chapter 616B, Section 32 of the Nevada Revised Statutes permits a private carrier to provide industrial insurance (workers' compensation) as a part of a homeowner's insurance policy to a person who employs a domestic service worker. A covered domestic service worker is defined as an individual who is employed more than 20 hours per week or earns \$150/month if he/she is not employed more than 20

hours per week. Private carriers may, with approval of the commissioner, determine and fix the premium rates.

In New Hampshire, Title XXII, Section 281-A:6 mandates that all insurance companies authorized to provide comprehensive personal liability, tenant's or homeowners' insurance must, in connection with such insurance, provide workers' compensation insurance covering domestics unless the employer has a separate policy covering his/her workers. Premiums, rates and policy forms or endorsements used by a company to provide workers' compensation insurance in accordance with the statute are subject to the approval of the insurance commissioner. The annual premium was quoted to be \$3.00/policy. One drawback of the New Hampshire law is that individuals with disabilities can not take advantage of this option because the state's workers' compensation law prohibits a person with a disability from classifying his/her PAS worker as a domestic service worker. One state workers' compensation agency staff person reported this feature was part supported by the state's home health industry which has not supported the state implementing a self-directed support service model that allows individual service recipients to be the common law employer of their workers. Currently, New Hampshire only allows the Agency with Choice model to be used to implement self-directed support services where the agency and the service recipient have a "joint employment" relationship.

Since 1985, NY Insurance Law §3420(j) mandates that every homeowner's insurance policy that provides comprehensive personal liability insurance on a one-; two-; three-; or four- family owner-occupied dwelling, must make available compensation coverage for employees who work less than 40 hours a week in and around the home, if and only if, they are covered employees under the law. The major shortfall of this provision is that domestic service workers are exempt from the state's workers' compensation law if the employee works less than 40 hours a week. Therefore, household employers who hire occasional domestic/PAS workers can not use this option and must purchase a standard workers' compensation insurance policy to provide coverage for these workers (Stogel, 1998).

Colorado permits insurance carriers to provide workers' compensation coverage through a homeowner's insurance policy for occasional workers. Insurers can modify the endorsement to provide more coverage than insurance law requires. No statute or rate information was available from state agency staff.

With the exception of California, Colorado, Nevada, New Hampshire, New Jersey and New York, it is not clear how jurisdictions that reported the availability of workers' compensation insurance coverage through homeowners' and tenants' insurance policies are administering the option and what it costs to purchase such an endorsement. Moreover, it is not clear how many carriers are writing the endorsement and how many household employers are purchasing it to cover their workers for workers' compensation. Overall, the majority of state workers' compensation and insurance agency staff contacted appeared to be not well versed regarding the availability and use of this option or the status of the endorsement filed with the state for use by NCCI for that purpose.

In the jurisdictions where the option is technically available, many workers' compensation and insurance department staff reported that they knew of very few, if any, insurance carriers currently writing an endorsement for workers' compensation for domestic service (outside of New Jersey, California and New Hampshire). It was reported that this was due, in part, to insurance carriers' inexperience with workers' compensation insurance and their perception that the domestic service classification group is high risk.

Finally, it may be "risky" for homeowners and tenants to have a workers' compensation claim filed on his/her homeowner's or tenant's insurance policy that includes an endorsement for workers' compensation insurance. Recently, there have been a number of articles in the press (both newspaper and television news), regarding the tightening of the homeowners' insurance market and the difficulty that some homeowners have had filing insurance claims and subsequently having their homeowners' insurance premiums significantly increased or their policies cancelled. For example, some insurance companies recommend that homeowners and tenants not file insurance claims under \$500 to avoid either having their homeowners' or tenants' insurance premiums increased substantially or their policies cancelled. Although the prevalence of workers' compensation claims for consumer-directed personal assistance has been low,<sup>58</sup> one claim could be for a significant sum, depending on the nature of the injury. Homeowners may not want to risk having their homeowners' insurance premiums substantially increased or policies cancelled (since homeowners' insurance is usually a requirement of a mortgage) by having a worker's compensation claim filed. Once a homeowner's or tenant's insurance policy containing a workers' compensation insurance endorsement is cancelled, it may be difficult or impossible for the consumer to find a worker's compensation endorsement for domestic service available through a state's residual workers' compensation insurance market.<sup>59</sup> Thus, publicly-funded self-directed support service programs and program participants who are common law employers of their personal care workers may prefer to obtain a separate standard workers' compensation policy for their personal assistance workers, and either a homeowner's or tenant's insurance policy.

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<sup>58</sup> Massachusetts and New Jersey's Medicaid self-directed support service programs have had very low (MA) or no claims experience (NJ) since they started providing workers' compensation insurance for all workers three years ago. Actual loss experience for two Medicaid-funded self-directed support service program has not supported the insurance industry's perception of workplace risk for personal assistance service workers. The MA Medicaid PCA Program (9,291 consumer-employers in 2003-2004) has had a low number claims since workers' compensation insurance policies have been required of all consumer-employers in 1999. In 1999-2000 there were 4,581 consumer-employers and 70 claims, all closed as of 6/30/03. In 2000-2001 there were 5,666 consumer-employers and 52 claims, all closed as of 6/30/03. In 2001-2002 there were 6,938 consumer-employers and 68 claims, with 5 claims still open as of 6/30/03. In 2002-2003 there were 8,144 consumer-employers with 80 claims, with 22 open as of 6/30/03. For the period 2001-2002, McCarthy Insurance Agency reported that Atlantic Charter, the voluntary insurance carrier for consumers enrolled in the MA Medicaid PCA Program, received approximately \$2,389,620 in audited premiums and paid out approximately \$489,900 for 68 claims based on approximately \$119,385,197 in total payroll. Program staff for the NJ Personal Preference Program (500 consumer-employers in 2003) reported there have been no claims filed from the date consumers started receiving services in May 2000 to the present (9/30/03).

<sup>59</sup> This is not the case in New Jersey.

## 6. Alternative Workers' Compensation Plan

The final option available to household employers to access workers' compensation insurance for their domestic service workers is an Alternative Workers' Compensation Plan. Alabama, Georgia and Louisiana provide employers, including householders, the option of purchasing an Alternative Workers' Compensation Plan. The Plan is commercial insurance purchased in the voluntary market from life-health insurance companies. It may consist of any combination of life, disability, accident, health, or other insurance provided that the coverage insures without limitation or exclusion all of the workers' compensation benefits as defined in the State's workers' compensation law. Sometimes the coverage is sold together with employer liability policies issued by affiliated or non-affiliated liability insurers. In the absence of an affiliation, the liability insurer would normally be a joint venturer, or involved in a "strategic alliance" or similar group enterprise with the life insurer (Lencsis, 1998).

Alabama was the only jurisdiction that reported the availability of Alternative Workers' Compensation Plans for employers. However, there was a reference to the availability of Alternative Workers' Compensation Plans for employers in Louisiana and Georgia, but, no further details could be obtained.

### **D. What Are Employment Classification Systems?**

One of the fundamental tasks in pricing workers' compensation insurance is developing a system for classifying different workplace exposures into a system of codes, each one with a rate commensurate with the associated risk. For example, the classification of a clerical worker should carry a significantly lower rate than the code for a roofer, because the average workplace exposures of the two types of employment are quite different (Advanced Insurance Management, 2003).

In approximately 40 states and Guam, the classification system used is the one originally developed and currently maintained by the National Council on Compensation Insurance (NCCI) (see Table 7). NCCI has developed and maintains approximately 600 classification codes covering a variety of workplace exposures including domestic service. NCCI publishes these codes in their manual, *National Scopes Manual* (NCCI, 2003).

In addition, a small number of jurisdictions either use a jurisdiction-specific code(s) that is included in the NCCI manual (e.g., MA, NV) or jurisdiction-specific codes that are maintained in jurisdiction-specific classification manuals (e.g., Puerto Rico) (see Table 7).

In general, the NCCI classification system seeks to classify the overall business enterprise of an employer, not the particular work performed by specific employees. For that reason, a janitor working at a manufacturing plant will be assigned to the overall manufacturing classification used by the plant, not to a janitorial classification. However, the NCCI classification system makes an exception to this approach for construction-type

classifications. For these employers, multiple classifications may be assigned to employees, depending on the actual work done (e.g., a clerical worker versus a construction worker) (Advanced Insurance Management, 2003).

A basic tenet of an employment classification systems is, the more credible the data used to develop a classification, the better the classification will reflect the risks of workplace exposure associated with the business enterprise and the better the rates and premiums will cover the risk. When accurate and credible data are available, the classification system can be self-correcting, and codes can be updated as needed to reflect the new risk information.

Some might argue that developing codes solely based on the overall business enterprise, without considering the tasks performed by specific employees, does not accurately measure the risk of workplace exposure. For example, under the code 0913, Domestic Service, Inside (Full-time), the business enterprise provided in and around a residence is defined in broad terms.<sup>60</sup> However, the terminology used to define domestic service may not accurately measure the risk of workplace exposure, particularly for PAS workers. For example, the risk of workplace injury for a housekeeper providing chore services may be different than for a PAS worker providing both chore and personal assistance services.<sup>61</sup>

However, focusing solely on specific workers' tasks, to the exclusion of the overall business enterprise, also may not accurately measure risk of workplace exposure. For example, workplace exposure for a domestic service worker providing chore and PAS for one household employer may be different than a PAS worker working for an agency-based provider who sends the worker out to multiple clients in different home-settings on a daily basis. This may be due in part because the agency-based PAS worker is serving more clients and traveling more, thus having more opportunity for injury.

In developing and maintaining employment classification codes, jurisdictions must address at least two issues. First, are a sufficient number of employers included in the employment classification code to provide meaningful risk information and to spread the risk and associated costs? Second, how should the jurisdiction balance the employer classification code's ability to predict risk of workplace exposure with the time, effort and costs required to collect and analyze the required data to maximize the code's predictive ability?

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<sup>60</sup> 0913 states that domestics include: "a cook, housekeeper, laundry worker, maid, butler, companion, nurse and babysitter."

<sup>61</sup> These are the two work categories that states often reported personal assistance service workers falling under.



1. Are Personal Assistance Services Included Under The Domestic Service Classification?

Developing and maintaining employer classification systems and determining what the proper employment classification code is for a particular employer is not always an easy task. It is particularly difficult for household employers who employ PAS workers.

There are four NCCI employment classification codes that specifically apply to domestic/personal assistance services activities:

- 0908 Domestic Workers – Inside – Occasional,
- 0913 Domestic Workers - Inside (Full-time),
- 0909 Domestic Workers – Outside – Occasional – Including Occasional Private Chauffeurs, and
- 0912 Domestic Service – Out-Side (Full-time).

There is also code 0917, Domestic Service Contractor, which applies to employers furnishing employees under contract for domestic service performed inside a customer's residence and includes operation of training schools. Since this category is not applicable for household employers, it was not included in the study.

The two codes that are primarily used for PAS workers are 0908 Domestic Workers – Inside – Occasional and 0913 Domestic Workers – Inside (Full-time). The two worker categories within these codes cited by workers' compensation program and rating staff as reflecting personal assistance services are "nurse" and "companion." Although the majority of state agency staff reported that personal care fell under domestic service primarily due to the "nurse" and "companion" categories they also reported that the final determination of a worker's employment classification would be based on the results of a workers' compensation claim appeal.

There are three tasks that may be performed by a PAS worker that are particularly troublesome for workers' compensation program and rating staff to reconcile when determining what classification code PAS workers should fall into. These are: (1) assisting with the administration of prescription medication that would be administered by the individual in the absence of the disability, (2) providing occasional transportation, and (3) assisting with bowel and bladder and related health needs. The majority of jurisdictions reported that if a worker assists with the administration of medications, the worker would automatically move out of the domestic service classification category.

Jurisdictions were mixed regarding their approach to managing occasional driving. Workers' compensation insurance staff in Maryland and Nebraska reported that occasional driving was included in classification code 0913. However, New Jersey Rating Bureau staff reported that if occasional driving was provided, the worker should be classified as 0912 Private Residences – Outside, Full-time (Appendix A), to reflect the

increased risk associated with driving even though 90 percent of the workers' tasks fall under Domestic, In-servant.

Some workers' compensation agency staff reported being concerned with the potential risk associated with a PAS worker assisting with bowel/bladder and related health needs but had no clear policy on how they would address it except to say that they would review each situation on a case-by-case basis. Again, the final determination of what workers' compensation employment classification a PAS worker assisting with bowel/bladder and related health needs would fall into, would be based on the result of a workers' compensation claims appeal decision.

However, only classification codes 0918 Domestic Service Workers – Inside – Physical Assistance (MA), 9002 Domestic (ND), and 0912-011 Domestic Service and Housekeepers (PR) specifically include personal assistance/attendant care services (Appendix A). In addition, Wisconsin has developed policy separating PAS workers (e.g., home care providers hired by household employers) from domestic service. However, both domestic service and home care providers are exempt from the state's workers' compensation law and both types of workers are rated under the domestic service classification codes (see Table 7).

New Hampshire's workers' compensation law states that household employers with disabilities who have PAS workers cannot consider their workers as domestic servants (See Table 7). New Hampshire Title XXIII §281-A:2 V-b(a) states "Domestic labor or domestic services mean the performance of such duties as housekeeping, childcare, gardening, handy person work, and serving as a companion or caregiver for children or others who are not physically or mentally infirmed." This law was supported by the state's home health services industry that was opposed to the state implementing self-directed support service programs where the service recipient or his or her representative was the common law employer of the PAS worker.

Minnesota workers' compensation law states that if funding for services comes directly from the State commissioner of human services, then the worker is an employee of the state for workers' compensation purposes (see Table 7). Minnesota Statute 2002 §176 subd. 9(17) states that a worker who renders in-home attendant care services to a physically handicapped person, and who is paid directly by the commissioner of human services for these services, shall be the employee of the state within the meaning of this subdivision (workers' compensation) but for no other purpose. This corresponds with an unemployment law in Minnesota stating that individuals with disabilities who receive public funds for their service may not be considered the employer of their workers. The Minnesota law was enacted in response to an unfavorable experience the encountered in treating PAS workers as independent providers (e.g., independent contractors).<sup>62</sup>

Massachusetts has successfully blended aspects of both the overall business enterprise (e.g., domestic service) and employee-specific tasks for a PAS worker in

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<sup>62</sup> As independent contractors, workers were not paying their self-employment taxes in compliance with federal and state employment tax laws.

developing classification code 0918 Domestic Service Workers – Inside – Physical Assistance (both part and full-time). The State has left the code under the domestic service classification (09) (which applied to household employers) while effectively describing the occupation of a PAS worker and the tasks he/she might perform for a household employer who may have a functional disability (Appendix A).

## 2. Workers' Compensation Case Law Related To Domestic Service And Personal Assistance Service Workers

Ambiguities in workers' compensation statutes frequently are resolved in favor of coverage and otherwise valid claims frequently are not denied on the basis of a technicality (Nackley, 1989).<sup>63</sup> This was seen a number of times in the case law reviewed for this study, in particular when a worker not covered under the statute filed a workers' compensation claim when no insurance was available to cover the claim.

This study reviewed workers' compensation cases that were related to domestic service and PAS workers decided in 16 jurisdictions<sup>64</sup> (see Appendix C). Five of them specifically involved publicly-funded support service programs.<sup>65</sup> A number of themes emerged from the cases reviewed.

The majority of the cases reviewed involved whether there is an employer-employee relationship<sup>66</sup> – a pre-requisite to the obligation to provide workers' compensation insurance coverage – or the nature of the employee's services<sup>67</sup> – which are

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<sup>63</sup> One way for a household employer or a self-directed service program that allows a service recipient to be the common law employer of their personal assistance service workers to eliminate the uncertainty and potential liability inherent in the tendency of courts and administrative hearing officers to find coverage under a jurisdiction's workers' compensation law is to arrange for and purchase workers' compensation insurance.

<sup>64</sup> CA, CO, CT, FL, MD, NE, NV, NH, NY, OK, OR, PA, TX, WA State, WV, and WI.

<sup>65</sup> See *In Home Supportive Services v. Workers' Compensation Appeals Board*, 152 Cal. App. 3d 720, 199 Cal. Rptr 697 (3d App. Dist. 1984); *Bonnette v. California Health and Welfare Agency*, 704 F. 2d 1465 (Ninth Cir. 1982); *McFarland v. SAIF Corporation*, 89 Ore. App. 184; 748 P. 2d 150 (Ore. App. CT., 1988); *Linda J. Bromley*, Docket Nos. 93 3892 & 93 5100; Claims No. N-071072; Washington State Board of Industrial Insurance Appeals (1995); and *Odell B. Henderson*, Docket No. 93 4609; Claim No. N-390500, Washington State Board of Industrial Insurance Appeals (1995).

<sup>66</sup> In *In Home Support Services v. Workers' Compensation Appeals Board*, 152 Cal. App. 3d 720, 199 Cal. Rptr 697 (3d App. Dist. 1984) the Court held that implicit in the legislative history of the CA domestic service exclusion was a legislative purpose to impose the obligation of providing workers' compensation coverage for household domestic employers only when the risk spreading mechanism of insurance is available, as it might be in a case as this where dual employment could be found. In *Bonnette v. California Health and Welfare Agency*, 704 F. 2d 1465 (Ninth Cir. 1982), the Court found that the agencies exercised considerable control over the nature and structure of the employment relationship along with complete economic control and, hence, were held to be employer for the purpose of minimum wage requirements. This was not altered by the fact that the agencies delegated to the service recipients various employer responsibilities; that merely made them joint employers.

<sup>67</sup> In *McCallister v. Workers' Compensation Appeals Board*, 61 Cal. App. 3<sup>rd</sup> 524, 132 Cal. Rptr.527 the Court found that services provided in a private home solely to care for and wait upon a frail elder and that included no duties in connection with the maintenance or functioning of a household, was not domestic service excluded from coverage under then California Workers' Compensation Act. In *Viola v. Workman's Compensation Appeal Board*, 549 A. 2d 1367, 121 PA. Commw. 47 (1988) the Court struggled to find

sometimes partially or fully exempted if they are considered domestic services or do not meet minimum weekly hours worked. The decisions are often fact-specific or rest on creative legal theories not likely to be known to or anticipated by household employers, service recipients or self-directed support service staff. Workers with professional licenses, in some cases, are considered independent contractors (e.g., registered nurse, licensed therapist), not employees, and are therefore are deemed outside the protection of the workers' compensation system.<sup>68</sup> If the services are deemed to be for an individual rather than for the household in general<sup>69</sup> or include sufficient practical nursing<sup>70</sup> then coverage might be found because it is determined that the common domestic service exemption does not apply.

The tendency of a workers' compensation law judge to attempt to find coverage for an injured worker under the workers' compensation system is sometimes counterbalanced by concern for household employers who face great uncertainty about their obligations to provide coverage and their inability to pass on their coverage costs to some type of customers.<sup>71</sup> On the other hand, sometimes courts and administrative agencies go to great lengths to find an employer that will afford coverage, stretching employment concepts to find a "dual employment" relationship with employers that do not benefit from relevant exclusions from coverage. For example, decision makers might find that a domestic service exclusion applies to protect a household employer from the obligation to provide coverage but nevertheless find an obligation for a state agency to be an employer by virtue of its role in funding or other aspect of the worker's employment.<sup>72</sup>

Finally, in one state, it appears that the state workers' compensation hearing officers were confused about the role of the Fiscal/Employer Agent operating under section 3504 of the IRS code for publicly-funded self-directed support service programs. In both Pennsylvania workers' compensation settlements, the workers' compensation hearing officer required the Fiscal/Employer Agent to provide workers' compensation insurance coverage for the worker even though the service recipients had separate workers' compensation insurance policies executed through the State's Domestic Service Exemption Program for this purpose.<sup>73</sup>

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coverage for the injured worker looking for an employment relationship that would afford that coverage where the relationship between the recipient employer and worker would have been excluded as domestic service. The Court held that because the injured workers' job involved duties similar to a nurse's aide and did not involve household duties, she was not an excluded domestic servant.

<sup>68</sup> See *McCrary v. Thomas*, 40 Misc. 2d 904, 244 N.Y.S. 2d 111 (S.Ct., Kings County 1963).

<sup>69</sup> See *McCallister v. Workers' Compensation Appeals Board*, 61 Cal. App. 3<sup>rd</sup> 524, 132 Cal. Rptr. 527 and *In Viola v. Workman's Compensation Appeal Board*, 549 A. 2d 1367, 121 PA. Commw. 47 (1988).

<sup>70</sup> See *Dunagan v. Folkers*, Nebraska Workers' Compensation Court, Doc: 195 No: 2116, 1996 and *Nelson v. Bradshaw*, 791 P. 2d 485, 1990 Ok. Civ. App. (1990).

<sup>71</sup> See *Smith v. Ford*, 472 So. 2d 1223 (1985, FL 1<sup>st</sup> Dist. CT. App.).

<sup>72</sup> See *In Home Supportive Services v. Workers' Compensation Appeals Board*, 152 Cal. App. 3d 720 199 Cal Rptr. 697 (3d app. Dist. 1984).

<sup>73</sup> See *Dorothy Stock v. Abilities in Motion*, Pennsylvania Department of Labor and Industry Bureau of Workers' Compensation Claims Settlement (August 20, 2001) and *Community Resources For Independence, Erie, Pennsylvania*, Pennsylvania Department of Labor and Industry Bureau of Workers' Compensation Settlement (2001).

The only thing that one can say with *certainty* after reviewing the cases cited in this study is that a household employer faces great *uncertainty* when trying to assess the obligation to provide workers' compensation insurance coverage for a worker providing personal assistance services to a member of that household. One way to address this uncertainty is for the household employer, or in the case of publicly-funded self-directed support service programs, the program agency, to arrange and pay for workers' compensation insurance for personal assistance workers who work directly for service recipients in and around their homes. However, state self-directed support service program staff must make sure that state's workers' compensation agency staff, including the division responsible for claims adjudication, are fully briefed on the key features of the program and the Fiscal/Employer Agent function. Hopefully, this will prevent issues such as those that occurred in Pennsylvania from occurring in the future.

### **E. Establishing Workers' Compensation Rates and Premiums**

A number of methods are used by jurisdictions to establish workers' compensation rates and premiums. The following describes the key methods used.

#### **1. Establishing Standard Rates**

Jurisdictions reported using two basic pricing methods for setting workers' compensation rates for employment classification codes for the voluntary market: administered and competitive pricing. Administered pricing is the setting of full manual rates by a rating organization subject to insurance department approval, for use by all insurers that come under the jurisdiction of the rating organization. Manual rating is a process by which historic insurance statistical information is compiled, analyzed and projected into the future by trained actuarial professionals in order to produce manual premium rates (Lencsis, 1998). Eleven states<sup>74</sup> use administered pricing methods to establish rates for the voluntary workers' compensation insurance market.

Competitive pricing, in contrast, is the setting of advisory rates or loss costs by a rating bureau or an advisory association (NCCI), often subject to a jurisdiction's department of insurance approval, on behalf of its member insurers. Under competitive rating laws, insurers may be allowed to file for deviations from advisory rates, be required to file their own rates based on the advisory loss costs, or be allowed to file their own independent rates or loss costs with or without using advisory indications, depending on the state (American Academy of Actuaries, 2000). Thirty-nine states, the District of Columbia and three U.S. territories use competitive pricing methods to establish rates for the voluntary insurance market (see Table 3).

In a competitive pricing environment, the role of the rating bureau or advisory organization is to collect historical (actual) loss information, to apply actuarial techniques called "loss development" and "loss trending" to loss information and to produce either advisory loss costs (NCCI states) or advisory "pure premiums" (e.g., MD) for each employment classification code. Loss costs or a pure premium are the part of the

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<sup>74</sup> AZ, FL, ID, IL, IN, IA, MA, NV, NJ, NY, and WI.

premium rate attributable only to losses and loss adjustment expense. There are no general expenses, taxes or profits included in these costs. This information is usually filed with the state's department of insurance annually for review (e.g., including conducting rate hearings) and approval (Lencsis, 1998).

After the loss costs or pure premiums are approved and published, each individual insurer must make a filing with the state department of insurance adopting them with or without modification. In addition, they must file, their own specific proposed loss cost multiplier(s) for each employment classification code (and for each risk tier the state permits insurers to generate deviated standard rates). General expenses, taxes and profit are included in the loss costs multiplier (Lencsis, 1998). A standard premium is computed by multiplying the advisory loss costs by the loss costs multiplier for each classification code (and risk tier, if applicable). Then other factors may be applied to the standard premium based on state insurance rules and the insurer's policies and procedures. Even in competitive rating states, standard premium rates for policies under the residual market (e.g., Assigned Risk Plans) are usually the result of a separate administered pricing system whereby the rating organization files final rates for use by all assigned risk carriers.

Once workers' compensation rates are computed and approved by a state insurance department, they are compiled in manuals (and often published on state insurance agency web sites). One important resource is the multi-state *Basic Manual of Workers' Compensation and Employers Liability Insurance*, prepared and published by NCCI. The NCCI manual applies to jurisdictions that do not have independent rating bureaus or have exclusive state insurance funds.<sup>75</sup> The manual has three major parts, Rules, Classifications, and Rate and State Exceptions. It is updated on an ongoing basis as rate revisions and other changes occur (Lencsis, 1998). Household employers should be careful when reviewing standard rates for carriers since they only reflect a portion of the total premium he or she will be paying for his/her domestic service workers.

## 2. Establishing Premiums

In order to determine a premium for a classification code a number of other constants, adjustments and assessments may be computed and applied to a standard rate. An expense constant frequently is applied to the standard premium. It was reported that in some states the expense constant is included in the loss costs multiplier. This constant reflects the administrative costs to the insurance carrier if the policy were cancelled prematurely by the consumer-employer. The expense constant can be mandated by a state or vary by insurer and the amount can vary significantly by state. For example, the expense constant in Montana was reported to be \$115 whereas, in New York it was reported to be \$180.

Often experience rating is applied to a standard premium rate. It is an adjustment to the standard premium rate for a current policy based on the insured's claims

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<sup>75</sup> CA, DE, NJ, NY and PA do not have rating bureaus. ND, OH, WA State, WV, WY, PR and VI have exclusive State Insurance Funds.

experience during earlier periods of coverage (Lencsis, 1998). Whether or not experience rating is applied to a standard premium rate depends on the size of an employer's total premiums over a one-to-two year period. For example, in Mississippi, an employer must have \$4,500 in premiums annually, whereas, in Kentucky an employer must have \$10,000 in premiums over a two-year period. As a result, experience rating may or may not be applied to a premium for domestic service and its application will vary by state.

Schedule rating is another adjustment that may be applied to the standard premium rates. This is a discretionary premium adjustment based on the underwriter's evaluation of special characteristics of a risk not reflected in experience rating (Advanced Insurance Management, 2003). Whether or not schedule rating is applied to a standard premium rate often depends on whether the employer is experience rated. Some states do not allow schedule rating, particularly in the residual market while other states leave it to the discretion of the insurance carrier.

A number of special assessments may be applied to the standard premium rate to compute a premium for employer. They include, but are not limited to:

- Second, Subsequent and/or Multiple Injury Fund assessments;
- Assessments to fund the State's Workers' Compensation System; and
- Terrorism assessments (as a result of the terrorism attack of 9/11/01).

Some states may apply a special assessment to premiums used by carriers servicing the Assigned Risk Plan. For example, Idaho applies a 30 percent Assigned Risk Premium Surcharge to the premiums used for the state's Assigned Risk Plan.

A small number of states allow insurers to establish "tiered rates" (e.g., deviations from the standard rates within a classification code, Maine and Utah). For example, Utah uses a three-tier system, Nonstandard, Standard and Preferred. State staff reported that household employers would fall in the nonstandard tier if he or she was a new employer or had a 100 percent loss ratio. The only way a household employer can get into the Preferred tier is if he/she had a loss ratio of 50 percent or less.

States reported that standard rates and premiums for the domestic service classification codes are expressed per capita, per \$100 payroll, per hour worked, or per household policy (see Table 4, Table 5, and Table 6). The per capita method is used most frequently by jurisdictions for domestic service classification codes. Forty states<sup>76</sup> and the District of Columbia express standard rates for domestic service in per capita terms. The per capita method is good for insurers because each worker has a premium computed that hopefully covers the risk of workplace exposure. It should be noted, however, that a number of insurers in various states reported that because domestic service premiums tend to be low in comparison to other business enterprises, one large claim can often use up all the premiums paid and then some.

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<sup>76</sup> AL, AK, AR, AZ, CO, CT, DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MI, MN, MS, MO, NE, NV, NH, NJ for FT workers only, NM, NY, NC, OK, PA, RI, SC, SD, TN, TX for FT workers only, UT, VT, VA, WI.

The per capita approach also can result in significant tracking and paperwork activities, and related expense, for household employers and insurers. Domestic service workers, and in particular, PAS workers, often work part-time and turnover of staff can be significant. Under the per capita approach, premiums often are computed for each worker employed by the household employer. In addition, employers and insurers must keep track of the number of employees working in the home on an ongoing basis to make sure that the proper coverage has been obtained and premiums charged. Some states (e.g., PA) and NCCI have tried to streamline the rate and premiums setting process and to find economies for premiums by developing a part-time rate/premium setting methodology. Under such methods, an employer may have three part-time workers who work in a total of 40 hours. Instead of paying three premiums, the employer would pay two premiums (e.g.,  $40/20$  (the part-time threshold figure) = 2). A problem identified regarding the part-time methodology was not all NCCI states and NCCI regional staff reported that they were aware of this methodology or used it. Rather, they reported establishing rates and premiums on a “per capita” (e.g., “per worker”) basis.

The “per \$100 payroll” method streamlines the process for establishing rates and premiums for household employers because the employer no longer needs to “count heads” and premium covers all workers employed in the household under the particular classification code for the policy. This is a beneficial feature for the household employer however, it could introduce added risk of workplace exposure for the insurer. For example, a household employer might hire one worker and have an annual payroll of \$10,000. Then the worker stops working for the employer and the employer replaces the worker with two workers at the same payroll amount (\$10,000). Insurers feel the risk of workplace exposure now is greater because there are two workers who could be injured on the job versus one. However, the premium remains the same. Nine states<sup>77</sup> and five U.S. territories<sup>78</sup> reported using the “per \$100 payroll” method for computing standard rates which resulted in premiums that were “per household policy” for household employers who hired domestic service workers (see Table 4, Table 5 and Table 6). It should be noted that at least two states, (e.g., CA and TX) use both approaches to establishing rates and premiums. They use the per capita approach when computing rates and premiums for occasional domestic service workers and they use the per \$100/payroll and the per household policy approach when computing full-time rates and premiums, respectively.

Washington State is the only state that uses the “per hour worked” and “per household” policy approach to establish rates and premiums, respectively. The theory behind the per hours worked approach is that the more hours worked by domestic employees for a household employer the greater the possible risk of workplace exposure, resulting in premiums that effectively reflect the potential risk of workplace exposure for all workers employed. However, this method is dependent on good time sheet data. This typically would be readily available from the Fiscal/Employer Agent, however, it’s unclear if household employers paying their domestic service workers out-of-pocket would be able to provide accurate hours information on a consistent basis.

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<sup>77</sup> CA, MD, MA, MT, OR, TX for PT workers, ND, OH, WV.

<sup>78</sup> American Samoa, Commonwealth of Northern Mariana Islands, Guam, Puerto Rico and Virgin Islands.



New Jersey is the only state that establishes both rates and premiums based on an all inclusive (for the classification code) per household policy method for occasional domestic service workers. They use the per capita method to compute rates and premiums for full-time domestic service workers.

Finally, workers' compensation insurance is initially written based on estimated premiums. This is because it is not possible to know ahead of time exactly how many workers will be employed by or what the exact payroll will be for an employer. Thus, once a policy year ends, there is normally some kind of effort made by the insurance carrier to determine actual number of workers/total actual payroll for the policy period. Depending on the size of the premiums, an insurance carrier might send a premium auditor to determine actual number of workers/total payroll. After this information is collected, the insurance carrier will compute and issue an "audited premium" to the employer (Advanced Insurance Management, 2003).

### 3. What Are Minimum Premiums?

A minimum premium is the lowest premium required to provide insurance under a standard policy in a particular insurance market and jurisdiction. For the household employer, this means the minimum premium amount is the least he/she will pay for a premium in the state. Minimum premiums can vary by market (voluntary, state fund and residual) and by jurisdiction, however actual premiums vary by insurer and employer in the voluntary insurance market. Therefore, it was decided to report premium information using minimum premiums in order to assess the affordability of workers' compensation insurance for household employers who employ domestic/PAS workers in a consistent manner by the insurance market (see Table 4, Table 5 and Table 6).

A number of jurisdictions reported minimum premiums based on an employer hypothetically having "no payroll." They advised household employers to purchase at least this level of coverage so they can demonstrate they have a basic level of coverage should their worker be injured and file a claim.

## **IV. WHICH JURISDICTIONS AFFORD HOUSEHOLD EMPLOYERS ACCESS TO WORKERS' COMPENSATION FOR THEIR DOMESTIC SERVICE/PERSONAL ASSISTANCE SERVICE WORKERS? HOW DOES ACCESS VARY BY INSURANCE MARKET AND JURISDICTION?**

There are a number of factors that affect a household employer's access to workers' compensation insurance for their domestic and PAS workers. The factors include, but are not limited to:

- Statutory requirements;

- Insurance agents/producers' willingness to process household employer's applications with voluntary carriers;
- Insurance carriers' willingness to write policies for household employers;
- The requirement to use an insurance agent/producer;
- The requirement to obtain refusals (declination letters) from the voluntary market to access the residual market; and
- The cost of workers' compensation insurance premiums.

Except for Wyoming, all states, the District of Columbia and the five U.S. territories<sup>79</sup> allow household employers of domestic service workers to elect to provide workers' compensation coverage for their worker (see Table 1).

The following discusses the level of access to workers' compensation insurance for household employers by insurance market sector.

#### **A. Voluntary Insurance Market**

State workers' compensation agency staff in the majority of jurisdictions reported that access to workers' compensation insurance for household employers in the voluntary market is extremely limited and in some cases, "non-existent" (see Table 3). The major reasons reported were small payrolls with small premiums, significant administrative paperwork and related costs, and perceived risk of liability related to the domestic service classification and, in particular, related to PAS workers (see Table 3).

Using an insurance agent/producer could be seen as both an advantage and a barrier to accessing the voluntary market. Conventional wisdom says that using an insurance agent/producer facilitates a household employer's accessing worker's compensation insurance since the agent understands the insurance business and can provide the voluntary carrier with the information it needs to process a household employer's application in an efficient manner. However, state workers' compensation agency staff reported that using an insurance agent can be a barrier for a household employer accessing the voluntary market for a number of reasons. First, not all agents are familiar with workers' compensation insurance. If he or she is not knowledgeable regarding workers' compensation laws and policies for household employers in his or her jurisdiction, access could be more difficult and the policy more costly.<sup>80</sup> Second, insurance agents may have little or no incentive to process a household employer's application with a private insurer due to the low fee they receive and the administrative burden and associated costs related to processing policies for individual household employers. Insurance agents typically receive \$15-20 for each policy they broker.

<sup>79</sup> Household employers residing in the Navajo Nation must purchase workers' compensation insurance from an Arizona voluntary carrier or through the residual market.

<sup>80</sup> Per discussion with staff at the MD Injured Workers' Insurance Fund.

Insurance agents reported that their administrative fee does not cover the cost of managing the administrative paperwork and does not provide a reasonable return.<sup>81</sup>

Twenty-four states<sup>82</sup> and the District of Columbia require and 10 states<sup>83</sup> recommend household employers use insurance agents/producers when accessing workers' compensation through the residual workers' compensation insurance market. In California, using an insurance agent/producer is optional (see Table 10 and Table 11). One insurance agent in Massachusetts suggested a minimum number of policies (3,600) and premiums (\$1.3 million) that might provide an insurance agent and a voluntary insurance carrier with the incentive to write workers' compensation insurance policies for a group of household employers such as those enrolled in publicly-funded self-directed support service programs that use Fiscal/Employer Agents.

## **B. Exclusive And Competitive State Insurance Funds**

Household employers had the best success accessing workers' compensation insurance from exclusive state insurance funds, with the exception of Wyoming (see Table 10). The primary reason for this was that the Fund was the only source of workers' compensation insurance in a state and, in general, accepted all comers. Household employers had moderate success accessing workers' compensation insurance from competitive state insurance funds. In fact, a number of competitive state insurance funds provided a high level of access (CA and PA).

For example, in California, the State Compensation Insurance Fund is the only source of workers' compensation insurance for household employers hiring domestic service workers, however, they are supposed to make an attempt to cover their workers through an endorsement for workers' compensation on their homeowners' policies first. In addition, Pennsylvania has developed a streamlined "Domestic Service Exemption Policy" for household employers guaranteeing access to workers' compensation insurance at a relatively affordable price.

Not all competitive State Insurance Funds are enthusiastic about providing workers' compensation insurance to household employers. During an economic slowdown in 1989, the Oregon SAIF reportedly cancelled policies for approximately 10,000 small employers. This resulted in a significant outcry across the State that the SAIF was no longer a "main street" insurer (Oregonians for Accountability, 2003). In addition, SAIF staff reported that they were concerned about household employees being "a high risk for work-related injury" but did not provide any specific examples or statistics to support their argument.

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<sup>81</sup> Per discussion with DC Office of Workers' Compensation staff and Agent for the New Jersey Personal Preference Program.

<sup>82</sup> AL, AR, CT, FL, GA, ID, IL, IN, IA, KS, KY, LA, MA, MN, MS, NV, NH, NJ, NM, OR, SC, SD, VT, and VA.

<sup>83</sup> AK, AZ, DE, ME, MO, MT, RI, and TN.

### **C. “Insurers/Markets Of Last Resort”**

Although many “Insurers/Markets of Last Resort,” have an explicit or implicit mandate to serve small and moderate sized employers, overall they were less likely than exclusive and competitive state insurance funds to provide workers’ compensation insurance coverage for household employers who hire domestic servants (see Table 11). For example, staff at the Minnesota State Mutual Fund Company reported that even though they focus on small to medium-sized employers, they probably would not write a policy for a household employer. In addition, an agent/producer (which is required to be used to access the company) probably would not approach the company with a household employer’s application due to low fee (\$15-20 per policy) compared to the paperwork burden. Thus, the household employer would have to go to the State’s Assigned Risk Plan to access workers’ compensation insurance (which also requires that an agent be used).

Arizona and New Mexico are examples of states that more effectively focus the mission of their insurer/market of last resort towards small to moderate sized employers. This approach provides small and moderate sized employers with an alternative to purchasing workers’ compensation insurance other than the state’s residual market (e.g., Assigned Risk Pool). However, it is to be determined exactly how useful this option will be for household employers residing in Arizona and New Mexico who wish to purchase workers’ compensation insurance for their in-home domestic service workers, including personal assistance workers.

### **D. Residual Insurance Market**

Household access to workers’ compensation insurance through residual markets in the majority of jurisdictions is at least moderate, particularly in states that have both “insurers/markets of last resort” and Assigned Risk Plans (see Table 11). However, the key to access in this market depends on: (1) whether an employer must use an agent, (2) how many declination letters must be obtained, and (3) the price of the premiums. Twenty-four states’ and the District of Columbia’s Assigned Risk Plans and or “market/insurer of last resort require that an employer use an insurance agent/producer to access the residual market (see Table 11). The majority of states that require declination letters require at least two.<sup>84</sup> Michigan and North Carolina do not require any declination letters. Georgia requires four declination letters. Insurance agents willing to broker workers’ compensation insurance for a household employer often can facilitate the receipt of declination letters from the voluntary insurance market.

It is unclear whether a household employer in states where domestic service is exempt from a state’s workers’ compensation law can access an Assigned Risk Plan administered by NCCI. At first NCCI staff reported this was not be possible. Subsequently, it was reported that it would be up to the state workers’ compensation agency (all of which said householders could access coverage through the State’s

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<sup>84</sup> In cases where the policy is being renewed, often one declination letter can be from the insurance company that is canceling the employer’s workers’ compensation insurance policy.

Assigned Risk Plan) and the direct assignment or servicing carrier that NCCI assigned the application. The only case reported where an application from an employer in an exempt classification (domestic service) was denied by a direct assignment or servicing carrier was in Vermont related to its self-directed support service programs. According to NCCI staff, Vermont is currently working with NCCI (the State's Assigned Risk Plan administrator) to develop an effective process to cover consumer-employers who are enrolled in the various self-directed support services programs operating in the State.

## **V. HOW DOES THE COST OF WORKERS' COMPENSATION INSURANCE PREMIUMS FOR HOUSEHOLD EMPLOYERS VARY ACROSS JURISDICTIONS AND MARKETS?**

The workers' compensation insurance premiums for household employers who employ domestic service workers, including PAS workers, vary significantly by insurance market and jurisdiction (see Table 4, Table 5 and Table 6). Minimum premium information from the various jurisdictions and markets was analyzed as a proxy for actual premiums in the various insurance markets because minimum premiums represent the lowest premiums that would be paid by an employer in order to provide insurance under a standard policy.

It should be noted that jurisdictions that establish workers' compensation insurance rates and premiums on a per capita basis may cost the household employer more in total premiums paid due to the fact that rates and premiums are "per employee" versus "per household." Moreover, it also should be noted that minimum premiums for the occasional worker classifications often cover up to two part-time workers.<sup>85</sup> The following discusses the affordability of workers' compensation insurance for household employers of domestic service/PAS workers by insurance market and jurisdiction.

### **A. Voluntary Insurance Market**

It was not possible to analyze workers' compensation insurance premiums in the voluntary insurance market since they vary by insurance carrier. However, it was possible to evaluate minimum premiums for the administered pricing states (see Table 5). Minimum premiums for Domestic Service, Inside, Occasional (Classification 0908) for states that use administered pricing ranged from a low of \$16.00 per year per household policy in New Jersey (actual premium rather than minimum premium) to a high of \$427.00 per capita per year in Florida. If a Floridian has more than two part-time domestic/personal care workers, the cost of workers' compensation insurance can become prohibitive very quickly.

The minimum premiums for Domestic Service, Inside, Full-time, (Classification 0913) ranged from a low of \$76.00 per year per household policy (actual premium in NJ) to \$750 per capita per year in Florida. Moreover, if a Floridian had more than two full-time domestic/personal care workers, the cost of workers' compensation insurance could

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<sup>85</sup> Per NCCI's formula for computing premiums for part-time domestic service workers.

become prohibitive very quickly. New Jersey was found to offer the most affordable workers' compensation premiums of all the jurisdictions.

## **B. State Insurance Funds**

In general, minimum premiums for states and U.S. territories with State Insurance Funds were less than residual workers' compensation insurance market<sup>86</sup>. They also tended to use the per \$100/payroll and per household policy methods to establish rates and premiums more often (see Table 6). Minimum premiums for state insurance funds for Domestic Service, Inside, Occasional (Classification 0908) ranged from a low of \$130.88 per year household policy in New York to a high of \$400 per year per capita in Utah. Minimum premiums for state insurance funds for Domestic Service, Inside, Full-time (Classification 0913) ranged from a low of \$175 per household policy per year in Maryland to a high of \$505 per year per capita in Pennsylvania.

## **C. Residual Insurance Market**

In general, minimum premiums for the residual insurance market were the highest for household employers and used the per capita rate and premium method most often (see Table 4). Minimum premiums for the residual market for Domestic Service, Inside, Occasional (Classification 0908) ranged from a low of \$130.88 per year household policy in New York to a high of \$664 per year per capita in Florida. Minimum premiums for the residual insurance market for Domestic Service, Inside, Full-time (Classification 0913) ranged from a low of \$175 per household policy per year in Maryland to a high of \$1,542 per year per capita in Florida.

# **VI. ISSUES AND CHALLENGES REGARDING THE ADMINISTRATION OF WORKERS' COMPENSATION SYSTEMS AND PROVIDING INSURANCE FOR DOMESTIC SERVICE AND PERSONAL ASSISTANCE SERVICE WORKERS**

Workers' compensation agency staff and insurance carriers in reported a number of issues and challenges regarding the administration of workers' compensation systems and providing insurance for domestic service and PAS workers (see Table 13). The most frequently reported issue or challenge was related to classifying personal assistance under domestic service. Forty-five states, the District of Columbia and two territories (Guam and the Virgin Islands) reported that final determination of whether a PAS worker is included in the domestic service classification code for workers' compensation purposes could only be determined based on the results of a claim appeal decision. This represents significant uncertainty for household employers, particularly those living in states where domestic service workers are exempt from the workers' compensation law. A decision that a worker is nonexempt not only means that the household employer would have to

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<sup>86</sup> It was reported they were often less than the voluntary market for domestic service also but data was not available to confirm this.

incur the expense of workers' compensation insurance but also additional expenses related to penalties for non-coverage and risk of possible tort liability.

Another issue reported was that household employers' access to the voluntary insurance market is very limited. Of the 28 states that reported limited access to the voluntary market for household employers, five states<sup>87</sup> reported that the voluntary market was "non-existent" for household employers. Workers' compensation agency staff in Kentucky reported it was "virtually impossible" for household employers to access the voluntary insurance market. The major reason reported was that voluntary insurers carriers have little financial incentive to write policies for small (household) employers due to small payrolls and premiums; and significant burden and cost of paperwork; and the perceived risk related to household employers.

Maryland, New Jersey and the District of Columbia workers' compensation agency staff reported that insurance agents/producers may not have a financial incentive to broker workers' compensation insurance with an insurance carrier for household employers. The primary reason given was the amount of paperwork and cost related to processing a large number of individual employer applications compared to the small fee (\$15-20.00/policy) agencies receive to broker workers' compensation insurance with insurance carriers for this type of employer. The insurance agent that brokers workers' compensation insurance policies for service recipients enrolled in the New Jersey Personal Preference Program, for example, stopped performing this function in the Fall of 2003 because of the costs associated with processing large numbers (500) of initial individual policies and policy renewals. Workers' compensation agency staff in Maryland added that it is very important to use an insurance agent who is familiar with workers' compensation insurance, otherwise it could limit access to insurance and be more costly for the household employer.

Four states' workers' compensation agency staff<sup>88</sup> reported that the premiums for household employers tended to be low and may not cover the cost of losses incurred. Moreover, staff at the Ohio Bureau of Workers' Compensation reported "occasional users of domestic services should not be allowed to avoid tort liability at a cost unfairly low for the employer, and because of low premiums, unreasonably high to the State workers' compensation system."

Workers' compensation agency staff in Montana, South Carolina, Tennessee and Virginia indicated that determining who is included under domestic service and who is not is a particular challenge, especially determining whether a worker is an employee or an independent contractor. Virginia workers' compensation agency staff reported that they consider the majority of domestic service workers to be independent contractors, contrary to IRS policy. Workers' compensation staff in Montana reported, "it's difficult to verify that workers are performing the duties that are included in the domestic service classifications."

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<sup>87</sup> AR, FL, NH, NM, and NC.

<sup>88</sup> LA, OH, OK and WA.

Two states with self-directed support service programs (MA and NJ) reported low and no workers' compensation claims, respectively since workers' compensation policies were purchased for all service recipients' workers three years ago. For the period 2001-2002, Atlantic Charter received approximately \$2,380,620 in audited premiums. For that same period, the insurer paid out \$489,900 for 68 claims based on a total payroll of \$119,385.197.<sup>89</sup> As of March 31, 2004, no workers' compensation insurance claims had been filed for PAS workers working for service recipients enrolled in the New Jersey Personal Preference Program. However, less than a dozen workers have filed disability insurance claims with the state.<sup>90</sup>

In contrast, Maine Employers' Mutual Insurance Company (MEMIC) reported experiencing significant losses related to household employers who had purchased workers' compensation for their domestic service workers. MEMIC is the insurer for one state-funded and two Medicaid-funded self-directed support service programs administered by Alpha One in South Portland, Maine. Staff at the Louisiana Workers' Compensation Corporation added "there may be a higher risk of injury for PAS workers than for traditional domestic service workers so the NCCI classification codes 0908 and 0913 may not always be appropriate for PAS workers."

Workers' compensation agency staff in Missouri, Washington State and Wisconsin indicated that workers' compensation insurance premiums have gone up for all employers, including household employers. Workers' compensation agency staff in Wisconsin similarly reported that a few years ago, premiums were affordable, but they have gone up significantly for household employers.

Workers' compensation agency staff in Kansas, New York and Rhode Island purported that they do not see a lot of household employer policies or claims. As a result, workers' compensation agency and insurance carriers do not address issues regarding household employers and domestic service very often. In addition, workers' compensation agency staff in Kansas and Montana reported that small numbers of claims make it difficult for states to compile meaningful loss data and fairly assess the risk of workplace exposure for domestic service workers.

Minnesota and New Hampshire restricted employers with disabilities from including their workers under the domestic service classification. Minnesota workers' compensation insurance staff noted that individuals who have disabilities and receive public funding to pay for their services may not be considered as employers in Minnesota according to state unemployment laws. In addition, Minnesota Statute 2002 §176 subd. 9(17) states, "a worker who provides in-home attendant care services to a physically disabled person and who is paid by the Department of Human Services for services rendered is considered an employee of the State and not the person with the disability."

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<sup>89</sup> Information provided by The C.J. McCarthy Insurance Agency in September 2003.

<sup>90</sup> New Jersey has a mandatory, statewide disability insurance program for workers who become ill/disabled, but not in the course of their employment.



In New Hampshire Title XXIII, Section 281-A:2 Definitions V-b.(a) states that “domestic employee” or “domestic worker” means a person performing domestic services in a private residence for children or others who are not physically or mentally infirmed. Moreover, state workers’ compensation insurance staff noted that they could not identify what classification the worker would fall into. All employees, including domestic service workers, must be covered for workers’ compensation insurance.

Massachusetts reported a number of operational issues related to workers’ compensation insurance for household employers. First, the traditional NCCI classification codes did not properly classify PAS workers for workers’ compensation purposes. As a result, the State developed a domestic service code specific for personal assistance services (0918) (see Section VII - Promising Practices in this report). In addition, per capita-based premiums were problematic because of difficulty in estimating the number of employees working in a residence at any given period of time due to worker turnover. Moreover, per capita premiums represent significant paperwork burden and costs for both household employers and insurance carriers. As a result, rates for classification 0918 are computed on a per payroll basis and premiums are per household policy (see Section VII – Promising Practices in this report).

The agent brokering workers’ compensation policies for the Massachusetts Personal Care Attendant program reported that there may be a minimum number of household employers needed to provide a voluntary carrier with the financial incentive to write policies for individual household employers. The insurance agent for the State suggested a minimum number of 3,600 policies that reflect approximately \$1.3 million in premiums. The insurance agent in Massachusetts also reported that the Commonwealth’s Rating Bureau finally has accumulated significant loss data based on three years of experience. This data showed that the risk of workplace exposure for PAS workers in self-directed support service programs may not reflect the high risk perception of many rating bureau and insurance company staff. However, this information was not reflected in the new rates for FY 04 for classification code 0918 since the rate went up \$0.10/\$100/payroll.

The voluntary carrier writing policies for Massachusetts Personal Care Attendant Program participants cited two areas where Fiscal Employer Agents have facilitated obtaining and maintaining workers’ compensation insurance policies for program participants and processing support service workers’ claims. The Fiscal Employer Agent is the primary contact for the insurance carrier and provides the information necessary to initiate new policies and renew existing ones for the consumer-employers it represents. In addition, the burden and related expense of billing 10,000 consumer-employers has been reduced by allowing the insurance carrier to issue four invoices, one to each Fiscal Employer Agent for the consumer-employers they represent. Finally, the Fiscal Employer Agent is responsible for completing Wage Statement forms and submitting them to the insurer in a timely manner so the insurer can issue accurate benefits checks to the injured workers in the required time period.

Oregon workers' compensation agency staff reported that under the law pertaining to domestic service, if a home health agency has five or fewer clients registered with the Department of Human Services at a foster care site, the agency does not have to provide workers' compensation insurance coverage for the workers. This means the agency could have a chain of foster care sites, with many employees and still not have to purchase workers' compensation insurance for their workers. This was reported as a significant issue for state workers' compensation agency staff and local labor unions.

California State Insurance Fund staff reported that if a household employer hires a spouse, parent or child, they can never be covered by workers' compensation insurance either through a standard workers' compensation insurance policy or homeowners' insurance endorsement.

The U.S. territories reported the following issues/challenges:

- Making sure that employers have the proper coverage is a challenge (AS, GU, PR, and VI);
- Don't know of any household employers who have purchased workers' compensation insurance for their workers (GU and NMI); and
- Obtaining accurate reporting of domestic service workers' actual duties and hours worked (NMI).

Finally, the majority of state and territory workers' compensation insurance staff recommended that household employers purchase some type of workers' compensation insurance coverage for their workers, even in states where domestic service is exempt from the law. Wisconsin workers' compensation staff explained, "I wish all household employers would cover their workers for workers' compensation." Staff noted that having some coverage would protect the household employer from the uncertainty and risk of finding out they should have had coverage after the fact, when penalties for noncompliance are applied.

## **VII. PROMISING PRACTICES**

There are a number of promising practices that have been identified in this study. The following describes them by topic and jurisdiction.

### **A. Workers' Compensation Laws That Include Personal Assistance Services In The Definition Of Domestic Service – Hawaii**

Hawaii's workers' compensation law includes the term "attendant care" in the definition of domestic service. Hawaii Workers' Compensation Law §381-1(6) Domestic, includes attendant care and day care services authorized by the Department of

Human Service under the Social Security Act, as amended, performed by an individual in the employ of a recipient of social service payments (see Table 7). Hawaii partially exempts domestic service workers from its workers' compensation law.<sup>91</sup> By including attendant care in its definition of domestic service for workers' compensation insurance purposes, it has removed a significant amount of uncertainty for state self-directed support service program agencies and household employers, including service recipients who hire their attendant care workers directly. However, the Hawaii uses the standard NCCI domestic service classifications for rating purposes which is not clearly describe the duties performed by a personal assistance (attendant care) worker (see Appendix A).

## **B. Including PAS in the Employment Classification for Domestic Service – North Dakota**

North Dakota Century Code 65-01-02.17(b), Definitions, states that “any person whose employment is both casual and not in the course of the trade, business, profession, or occupation of that person’s employer.....” is not covered under the State’s workers’ compensation law. According to workers’ compensation agency staff, this language exempts domestic service workers from the law. The state’s employment classification for Domestics (9002) includes “those individuals performing home help services or providing personal assistance or home care for persons who are convalescent, aged or acutely or chronically ill or disabled” under the domestic service classification (see Table 7). Thus, PAS workers hired by a household employer to work principally inside the employer’s home is exempt from the State’s workers’ compensation law (see Appendix A).

State workers’ compensation hearing officers, primarily look to the law when making a decision regarding a claims dispute. Although it is a positive step for states to include personal assistance in its employment classification under “Domestics,” it does not eliminate the risk of a hearing officer determining that a PAS worker does not fall under the domestic service classification. To make sure that personal assistance falls under domestic service by law, domestic service needs to be clearly defined in a state’s workers’ compensation law and include PAS workers hired by household employers. Then if a state chooses to exempt domestic service workers from coverage under its workers’ compensation law, it should allow household employers to elect coverage for their domestic service workers including personal assistance workers.

## **C. Developing A Classification Code For Personal Assistance Services – Massachusetts**

Massachusetts has created an employment classification code specifically for personal assistance service. It is listed as 0918, Domestic Service Workers, Inside, Physical Assistance, and it is included in the *National Scopes Manual* (see Appendix C). This code applies to domestics who provide physical assistance in activities of daily

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<sup>91</sup> Hawaii’s Workers’ Compensation Law §381-1 (5) states, “Service performed by an individual for another person solely for the personal, family or household purposes if cash remuneration received is less than \$225 during the current calendar quarter and during each completed calendar quarter of the preceding twelve month period” is exempt from the state’s workers’ compensation law.

living principally inside the insured's residence. In addition, it includes activities such as (1) assisting with bowel and bladder needs, (2) providing transportation, (3) assisting with health related needs, and (4) assisting with taking medications prescribed by a physician that otherwise would be self-administered (see Appendix A).

What would reduce a household employer's risk of liability further would be if a state defined "Domestic Service" in its workers' compensation law and included personal assistance in the definition. Having the law and the employment codes consistent with each other would reduce subjectivity of hearing officers when making decisions in workers' compensation claims appeals. In the case of Massachusetts, personal assistance workers is not explicitly included under domestic service in the state's workers' compensation law. However, staff from the Medicaid Personal Care Attendant Program<sup>92</sup> and the state's Division of Health Care Financing and Policy have worked closely with the State's Rating Bureau and Workers' Compensation Agency to develop the classification so all the stakeholders are in agreement with its application. Moreover, all services recipients enrolled in the Medicaid Personal Attendant Care Program have executed workers' compensation insurance policies for their personal care attendants.

#### **D. Developing A Program Specifically Targeted For Domestic Service – Pennsylvania**

Pennsylvania's State Workmen's Insurance Fund (SWIF) has a program and a workers' compensation insurance policy, (e.g., Domestic Service Exemption Policy), specific to household employers who employ domestic service workers to work in and around their homes. It also has designated SWIF staff who are well trained and extremely knowledgeable regarding domestic service issues and SWIF policies and procedures. The application process for domestic service has been streamlined and SWIF staff is easy to access and extremely helpful.

#### **E. Accessing Workers' Compensation Insurance Through The Voluntary Insurance Market – Massachusetts**

Massachusetts successfully recruited an insurance agent<sup>93</sup> and voluntary insurance carrier<sup>94</sup> to broker and write workers' compensation insurance policies for over 9,000 persons with disabilities enrolled in the State's Medicaid Personal Attendant Care Program rather than obtaining insurance through the more costly residual insurance market. The insurance agent for service recipients enrolled in the MA Medicaid PCA Program suggested that a minimum number of 3,600 policies that reflect approximately \$1.3 million in premiums would provide an agent and voluntary carrier with an incentive to broker/write workers' compensation insurance policies for household employers enrolled in a self-directed support service program.

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<sup>92</sup> This program allows service recipient or their representatives to be the common law employer of their workers and use one of four Fiscal/Employer Agents to manage the payroll on recipients/representatives' behalf.

<sup>93</sup> C.J. McCarthy Insurance Agency, Inc. in Wilmington, MA.

<sup>94</sup> Atlantic Charter, Boston, MA.

**F. Accessing Workers' Compensation Insurance Through The Residual Market – Arizona and New Mexico**

Arizona and New Mexico both have residual insurance markets that consist of both “insurers/markets of last resort” and Assigned Risk Plans. Having both options appear to increase small and moderate sized employers access to workers' compensation insurance at more competitive prices. This approach has the potential of providing increased access to household employers who wish to purchase workers' compensation insurance for their in-home domestic service workers including personal assistance workers.

**G. Accessing Workers' Compensation Insurance For Domestic Service Through Homeowners' And Tenants' Insurance Policies – New Jersey**

New Jersey provides the most comprehensive system for accessing workers' compensation insurance for part-time and full-time domestic service workers, including PAS workers at the lowest rates of any jurisdiction and through both standard workers' compensation insurance policies<sup>95</sup> and workers' compensation insurance endorsements on homeowners' and tenants' insurance policies. By requiring all homeowners' and tenants' insurance policies to provide comprehensive personal liability insurance including workers' compensation insurance for domestic service workers, the State has addressed the following issues:

- The State has limited insurance carriers' workers' compensation insurance exposure only to domestic service workers. This is important because most property and casualty insurers may not feel capable of writing workers' compensation insurance policies for all occupations.
- By requiring all homeowners' and tenants' insurance policies to include workers' compensation insurance endorsements for domestic service, the State has spread the costs of insurance over a large number of homeowners and tenants, achieved economies of scale and kept the cost of the endorsement low.<sup>96</sup> In addition, New Jersey is an administered pricing state so the premium rates for the workers' compensation endorsement on homeowners' and tenants' insurance policies are the same.
- Purchasing workers' compensation insurance coverage through a homeowners' or tenants' insurance policy reduces the administrative burden for household employers who employ domestic service workers.

There are a number of potential disadvantages in providing workers' compensation through homeowners' and tenants' insurance policies. They include:

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<sup>95</sup> \$16.00 premium/policy for occasional workers and \$76.00 premium/household policy for the first full-time worker/policy/year and \$60.00 for each additional full-time worker.

<sup>96</sup> \$1/policy premium for occasional workers and \$61/policy premium for the first full-time worker and an additional \$60 for each additional full-time worker.

- The cost of the workers' compensation insurance claims, if in significant number and size, could eventually drive up the cost of homeowners' and tenants' insurance overall for all policyholders, regardless of whether they employ domestic service workers.
- The majority of State's workers' compensation insurance endorsements are meant to cover "occasional" domestic service workers. In the case of New Jersey, household employers must report if they hire one or more full time workers. Then, rather than paying the \$1.00 premium for the endorsement for occasional domestic service workers, the household employer is charged \$61.00/year for the first full-time worker employed and \$60/year for each additional full-time worker employed. If a household employer does not accurately report the work status of his/her domestic workers, he or she could be underinsured and increase the costs to the system.

Some homeowners and tenants may not want to include coverage for workers' compensation insurance in their homeowners' or tenants' insurance policies due to the fear that filing a workers' compensation claim might jeopardize their homeowners' insurance either due to significant premium increases or cancellation. (see Section III C (5) in this report).<sup>97</sup> It may be more prudent for a homeowner or tenant to obtain a separate, standard, workers' compensation insurance policy in addition to his or her homeowner's tenant's insurance policy to address the potential risk of liability of job-related injuries for their PAS workers.

#### **H. Rate And Premium Setting Methods -Massachusetts And Washington State**

Massachusetts uses the per \$100 payroll method to compute workers' compensation rates and the per household policy method for workers' compensation premiums. The per \$100 payroll method reduces the paperwork burden and related expense for both the household employer and insurer compared to the per capita method. In addition, the per household policy method for establishing premiums can represent a significant cost savings for household employers, particularly those who hire multiple part-time and/or full-time PAS workers.

However, using a per \$100 payroll method may not project the risk of workplace exposure accurately/adequately for the insurer. For example, a household employer may have a payroll of \$10,000 and have one worker. The worker may quit and the household employer may replace the worker with two part-time workers. Thus, the potential risk for injury has increased due to an increase in workers on the job site. However, the payroll amount and associated premium remains the same.

Washington State uses a "per hour" method for computing workers' compensation rates and the "per household policy" method for computing workers'

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<sup>97</sup> Homeowners insurance is often required for a mortgage and recently insurance carriers have been known to either significantly increase premiums or cancel policies when claims are filed.

compensation premiums. The per hour method more accurately measures the risk of workplace exposure for multiple workers since the number of hours worked is a good measure for projecting the risk of workplace exposure, especially if workers' wages are allowed to vary. However, the key to making this method "work" is the availability of accurate "hours worked" information. These data can be collected using a standard time sheet and time sheet collection, processing and data reporting can be facilitated by using a Fiscal/Employer Agent. However, it may be more difficult to get consistent timesheet information from self-pay household employers who are not receiving services through a publicly-funded self-directed support service program that uses one or more Fiscal/Employer Agents.

### **I. Using Minimum Premium Data to Develop Benchmarks For Workers' Compensation Premiums – New Jersey, Idaho and Maryland**

The minimum premium data presented in Table 4, Table 5, and Table 6 demonstrates the variability of workers' compensation insurance rates by market and jurisdiction for similar employment classifications (e.g., domestic service). Jurisdictions can use this information to develop benchmarks to compare their workers' compensation premiums and learn from other states' experience. For example, the jurisdiction that has the lowest actual premiums for a standard domestic service workers' compensation insurance policy from the voluntary and residual insurance markets is New Jersey. The actual premium for a standard workers' compensation insurance policy for all occasional domestic service workers in a household is \$16.00/household/year. The actual premium for a standard workers' compensation insurance policy for a full-time domestic service worker is \$76.00/year for the first worker and an additional \$60/year for each additional full-time worker hired. Under the homeowners' or tenants' insurance workers' compensation endorsement the premium is \$1.00/policy/year for all occasional domestic service workers working in the home and \$61/year for the first full-time worker and \$60/year for each additional full-time worker working in the home. The premiums for the standard workers' compensation insurance policy and the homeowner's/tenant's workers' compensation endorsement for domestic service are the same for both the voluntary and residual insurance markets.

Idaho and Maryland also offer low minimum premiums through a State Insurance Fund (e.g., \$150 per capita for 0908-occasional and \$175.00 per capita for 0913 – full-time and \$175 per household policy for 0913 – part or full-time, respectively (see Table 6). However, Idaho's minimum premiums for the residual insurance market are almost twice as much as the State Insurance Fund, whereas Maryland's minimum premiums are the same in the State Insurance Fund as they are in the residual insurance market (see Table 4).

**J. Using Fiscal/Employer Agents To Facilitate Purchasing Workers' Compensation Insurance, And Invoicing and Processing Claims – Massachusetts, New Jersey And Pennsylvania**

In Massachusetts, New Jersey and Pennsylvania, Fiscal/Employer Agents participating in the states' self-directed support service program (e.g., MA Personal Attendant Care Program, NJ Personal Preference Program, and PA Attendant Care Program) will not process a payroll check for a worker unless the service recipient has an executed workers' compensation policy for his/her PAS worker(s). Thus, the Fiscal/Employer Agent ensures the state self-directed support service program agency that workers' compensation insurance coverage has been obtained for all service recipients and renewed annually.

In each state, the Fiscal/Employer Agent is the key contact that communicates with either the insurance agent, voluntary insurance carrier/residual market administrator or both making sure initial policies are executed and that policies are renewed in a timely manner. In addition, each state's Fiscal/Employer Agent is responsible for completing the Wage Statement Form that the insurer needs to receive to accurately compute a benefit for an injured worker. The Fiscal/Employer Agent, in all three states is responsible for paying the service recipient's workers' compensation premiums out of their public benefit. In Massachusetts, the insurance carrier bulk invoices the four Fiscal/Employer Agents for the service recipients they represent, reducing the insurers invoicing effort from 10,000 to four invoices per year.

**K. Allowing Household Employers To Elect Workers' Compensation Insurance Coverage For Family Members Who Are Paid Domestic Service Workers, Including PAS Workers – Hawaii**

Many states' workers' compensation laws are silent on whether family members who are paid domestic service workers, including PAS workers, may be considered covered workers. For the purpose of this study it was determined that these states allowed household employers to elect workers' compensation insurance coverage for family members who are paid domestic service workers including PAS workers.

Hawaii exempts family members who provide paid domestic services, including personal assistance services from its workers' compensation law, but allows household employers to elect coverage for these workers. States should consider clarifying their workers' compensation laws to allow household employers to elect workers' compensation insurance coverage for family members who are paid domestic service workers including PAS workers.



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## **Links to Report PDF Files**

### **REPORT FILE**

Accessible at <http://aspe.hhs.gov/daltcp/reports/paswork.pdf>

Flanagan, Susan A. *Accessing Workers' Compensation Insurance for Consumer-Employed Personal Assistance Service Workers: Issues, Challenges and Promising Practices*. June 7, 2004.

### **TABLES FILE**

Accessible at <http://aspe.hhs.gov/daltcp/reports/pasworktables.pdf>

TABLE 1: Workers' Compensation Laws And Coverage Requirements For Domestic Service Employment By Jurisdiction

TABLE 2: Workers' Compensation Insurance Requirement, Self-Insurance And Penalties For Failure To Insure By Jurisdiction

TABLE 3: Voluntary Workers' Compensation Insurance Market By Jurisdiction

TABLE 4: Residual Market Minimum Premiums For Domestic Service Classification Codes By Jurisdiction

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### **APPENDIX FILE**

Accessible at <http://aspe.hhs.gov/daltcp/reports/pasworkappend.pdf>

APPENDIX A: Domestic Service Worker Classification Codes By Jurisdiction

APPENDIX B: NCCI Workers' Compensation And Employer Liability Insurance Policy WC 00 03 12 (Ed 4-84): *Voluntary Compensation And Employers Liability Coverage For Residence Employees Endorsement*

APPENDIX C: Workers' Compensation Law Case Digests By Jurisdiction